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**DECISION**

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

**FILE:** B-218188 **DATE:** April 8, 1985

**MATTER OF:** Lear Siegler, Inc.

**DIGEST:**

Agency head has statutory authority to waive application of Buy American Act restrictions after bid opening where he determines such action to be in the public interest.

Lear Siegler, Inc., protests the award of a contract for aircraft fuel tanks by the Naval Air Systems Command (Navy) to Israel Military Industries (IMI), an Israeli firm, under invitation for bids (IFB) No. N00019-84-B-0004. Lear contends that the Navy should have added a 50-percent evaluation factor to IMI's low bid price pursuant to the Buy American Act, 41 U.S.C. § 10a, et seq. (1982), which would have made IMI's evaluated price higher than the price offered by Lear.

Lear also filed suit in the United States District Court for the Central District of California, Lear Siegler, Inc., Energy Products Division v. John Lehman, et al., Civil Action No. 85-1125, seeking injunctive and declaratory relief and raising substantially the same issues as raised in the protest. The court has indicated an interest in our decision. We deny the protest.

The Memorandum of Agreement

Under the Buy American Act, supplies which have been manufactured in the United States are to be acquired by the United States government unless the head of the procuring agency determines it to be "inconsistent with the public interest" or "the cost to be unreasonable." 10 U.S.C. § 10a (1982). In accordance with Department of Defense Federal Acquisition Regulation Supplement (DOD FAR Supplement) § 25.205(71) (Defense Acquisition Circular No. 84-1, March 1, 1984), an offer of goods from a "non-qualifying country" is to be evaluated by adding a 50-percent evaluation factor to its price. A "qualifying country" is defined in DOD FAR Supplement § 25.001 as

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including a defense cooperation country that has an agreement with the United States for which the Secretary of Defense has made a determination and finding waiving the Buy American Act restrictions for specified items. In the case of IMI, a Memorandum of Agreement (MOA) was entered into between the United States Secretary of Defense and the Israeli Defense Minister on March 19, 1979. The MOA states that it only applies to manufactured items which are listed in Annex "B" to the MOA and that for such manufactured items, no price differentials resulting from "Buy National Laws and regulations" will be applied for evaluation of offers.

On March 19, 1984, the United States and Israel amended and renewed the MOA, but subsequently experienced delays in finalizing a revised Annex "B." Therefore, as an interim measure, the Under Secretary of Defense (Research and Engineering) issued the following instructions:

> "[T]he Services will consider exemption of the Buy American Act/Balance of Payments Program on a purchase-by-purchase basis if absent these penalty factors the offer of an Israeli product is the lowest price. My intent is not to exclude competition from Israeli products only because a new Annex 'B' has not been published. This is consistent with the provisions of the 1984 MOA."

The Under Secretary of Defense (International Programs and Technology) reaffirmed this position in subsequent correspondence with the Israeli Defense Mission to the United States. On January 16, 1985, 2 months after bid opening, and with the revised Annex "B" still not finalized, the Assistant Secretary of the Navy (Shipbuilding and Logistics) issued a determination and findings pursuant to the interim instructions exempting IMI from the application of the Buy American Act differential because he found that it would be "inconsistent with the public interest to apply the restrictions of the Buy American Act" to IMI's low offer. Award was thereafter made on February 19, 1985, notwithstanding the pendency of Lear's protest.

Contentions by Lear

We have recognized that a determination of whether a particular purchase from a domestic source under the Buy American Act is inconsistent with the public interest is a matter of discretion vested in the head of the department or agency concerned. Keuffel & Esser Co., B-193083, July 17, 1979, 79-2 CPD ¶ 35. Lear nevertheless contends that any agency discretion to grant a Buy American Act waiver to a foreign firm ceases at the time of bid opening. According to Lear, any post-bid-opening waiver constitutes a change in the stated evaluation criteria and compromises the integrity of the formal advertising system inasmuch as bid evaluation factors "must be objectively determinable, rigidly applied, and may not lawfully be changed after bid opening." Thus, Lear objects to the "secret" internal waiver granted by the Navy approximately 2 months after bid opening which, according to Lear, improperly displaced the firm as the true low bidder under the evaluation scheme existing at the time of bid opening.[1] Lear insists that there must be some point at which discretion ceases. Lear cites regulations referenced in the solicitation which provide (DOD FAR Supplement § 25.7502(b)):

> "The Buy American Act and the Balance of Payments Program restrictions are waived only for items listed in appropriate annexes to the agreements with the defense cooperation country. However, the absence

[1] The Israeli Ministry of Defense submitted a request to the Department of Defense to include the subject fuel tanks in Annex "B" 1 week prior to bid opening. Lear notes that the MOA itself states that requests for exemption by each government "shall" be submitted to its "opposite Annex 'B' Subcommittee chairman at least two weeks before proposals are due." Both the Navy and IMI contend that this language is inoperative until finalization of a revised Annex "B." We need not resolve this question.

> of an item from the defense equipment list is without prejudice to the authority of the Secretary to determine in any individual case that application of the restrictions to that item would be inconsistent with the public interest."[2]

Lear believes that this regulation neither authorizes the Secretary to "change" evaluation criteria after bid opening nor provides notice to bidders of such a possibility. Therefore, Lear requests that our Office recommend termination of IMI's contract as illegally awarded.

GAO Analysis

For the reasons that follow, we find this protest to be without merit. First, the Buy American Act, supra, expressly provides that "[n]otwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable . . . only [domestic goods] shall be acquired for public use." As explained below, we find nothing in the language of the act or its legislative history which limits the authority of the agency head to grant waivers before or after bid opening. Further, we find that agency regulations implementing the Act have consistently recognized the authority of the agency head to make determinations under the Act in particular instances after bid opening.

Concerning the restriction imposed on foreign purchases, we find pertinent the following legislative history (H.R. Rep. No. 882, 72d Cong., 1st Sess. 1 (1932)):

> "This is a restriction upon the governmental purchasing officers and agents, but permits the exercise of judgment on the part of any such officer or agency in allowing him to purchase goods not complying with such requirements if he

[2] Similar language also appears in the MOA.

> determines that compliance in a given case is inconsistent with the public interest, or if he determines that the cost of complying with the requirement would be unreasonable . . ."

We first note that an agency head, under the statutory scheme, must determine whether cost is "unreasonable" in a "given case" by examining bid prices after bid opening and then exercising the discretion he has under the statute to make the necessary determination. (Imposing a fixed percentage factor to the price of a foreign bid on a governmentwide basis only began after the issuance of Executive Order No. 10582, December 17, 1954, 19 F.R. 8723.) Thus, we stated in 48 Comp. Gen. 487 (1969):

> ". . . It was stated in 39 Comp. Gen. 309, at page 311, that 'it is obvious from a review of the legislative history of the Buy American Act that the unreasonableness of domestic bid prices was to be determined by comparison with foreign bid prices.' See, also, A-48328, April 28, 1933, which held, soon after the enactment of the Buy American Act, that 'the question whether there may be accepted and used foreign articles is one to be determined after the bids have been received and not before, as it cannot be determined whether the difference in price be unreasonable.'"

We also recognized soon after the enactment of the Buy American Act that Congress imposed upon the agency head a "specific duty involving the exercise of judgment and discretion" to determine whether the purchase of domestic articles "in the particular instance" would be inconsistent with the public interest. 14 Comp. Gen. 601 (1935). Thus, prior to 1954, the agency head clearly had authority to waive Buy American restrictions in a particular procurement after bid opening.

Even if we assume that Executive Order No. 10582, by establishing formulas for evaluating foreign bids, ended the discretionary authority of the agency head to determine in a particular instance whether the offered price

of a domestic good was unreasonable in relation to an offered foreign price, we think that the agency head retained authority under the statute to determine whether the purchase of domestic articles in a given procurement would be inconsistent with the public interest. Executive Order 10582 provided:

> "Sec. 3. Nothing in this order shall affect the authority or responsibility of an executive agency:
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> (a) To reject any bid or offer for reasons of the national interest not described or referred to in this order. . ."

Further, implementing military services procurement regulations since 1954 typically provide as follows (Armed Services Procurement Regulation (ASPR) §§ 6-103.3, 6-104.4 (1955 ed. Rev. 45)):

> "6-103.3 Unreasonable Cost or Inconsistency with the Public Interest. The restrictions of the Buy American Act do not apply when it is determined by the Secretary concerned that the cost of a domestic source end product would be unreasonable or that its acquisition would be inconsistent with the public interest. Such determination shall be made in accordance with ASPR 6-104.4.
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> . . . . .
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> "6-104.4(3) Proposed awards shall be submitted, in accordance with Departmental procedures, to the Secretary concerned for decision where:
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> (i) rejection of an acceptable low foreign bid is considered necessary to protect essential national security interests, such as maintenance of a mobilization base; or
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> (ii) rejection of any bid or proposal for other reasons of the national interest is considered necessary."

See also ASPR §§ 6-103.3, 6-104.4 (1963 ed.); ASPR §§ 6-103.3, 6-104.4 (1976 ed.)

Any such rejection of an acceptable foreign bid or rejection of any domestic bid or proposal must necessarily occur after bid opening. We see no distinction between rejection of a domestic bid because of national interest considerations or acceptance of a foreign bid through waiver of the Buy American restrictions after bid opening because of public interest considerations. We therefore will not question the Secretary's determination to exempt IMI's bid from the Buy American Act restrictions.

Lear also asserts that the Navy's internal determination to waive the Buy American restrictions was based on a consideration of IMI's total price, including options, contrary to the terms of the solicitation which provided only for evaluation of the price of the basic requirements. However, since IMI's bid price was low by about $1.6 million for the basic requirement and about $3.7 million with the options, we find no abuse of discretion here.

Finally, Lear complains that the Navy failed to follow applicable procedures in making an award notwithstanding a protest under the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175. We merely note that the Department of Justice is contesting the constitutionality of this act, the matter is currently in litigation, and we therefore see no need to further comment on this matter.

The protest is denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel