

DECISION

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

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FILE: B-217480

DATE: April 30, 1985

MATTER OF: Penthouse Manufacturing Co., Inc.

DIGEST:

1. Restriction contained in annual Department of Defense Appropriations Act prohibits agencies from purchasing certain enumerated items which are not of domestic origin and manufacture. Buy American Act provisions setting forth a preference for domestic products over foreign goods do not apply to procurements subject to this restriction. Definition of what is a "domestic end product" for purposes of the Buy American Act is not used to determine what constitutes a product reprocessed, reused, or produced in the United States for purposes of the Appropriations Act restriction.
2. GAO denies a protest alleging that an agency improperly rejected a bid specifying that clothing offered would be partially manufactured in Haiti when the procurement is subject to the Department of Defense Appropriations Act and the implementing regulations. Under GAO decisions, the act requires that each successive stage in the manufacturing process be domestic.
3. Provision annually included in Department of Defense Appropriations Act that restricts the purchase of certain items to those which are of domestic origin and manufacture permits Defense agencies to target, to a limited extent, procurements of these items to labor surplus areas.

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4. GAO dismisses as untimely a protest alleging that a solicitation improperly failed to incorporate a mandatory subcontracting clause where the protest was not filed until after bid opening, because the alleged deficiency was apparent on the face of the solicitation. Protests of such deficiencies must be filed before bid opening.

Penthouse Manufacturing Co., Inc., protests the rejection of its low bid as nonresponsive to invitation for bids (IFB) No. DLA100-84-B-1183. The solicitation, issued by the Defense Logistics Agency's (DLA) Defense Personnel Support Center, Philadelphia, Pennsylvania, was for the procurement of combat coats with a woodland camouflage pattern. DLA rejected the bid because Penthouse specified that it would not manufacture the requested items entirely in the United States. We deny the protest in part and dismiss it in part.

Since the procurement is for articles of clothing, DLA incorporated in the solicitation (clause I24) the standard clause entitled "Preference for Certain Domestic Commodities," as set forth in the Department of Defense Supplement to the Federal Acquisition Regulation (FAR), 48 C.F.R. § 252.225-7009 (1984). This clause provides in pertinent part:

"The Contractor agrees that there will be delivered under this contract only such articles of . . . clothing . . . as have been grown, reprocessed, reused, or produced in the United States, its possessions, or Puerto Rico. . . ."

In its bid, Penthouse specified that labor amounting to 12 percent of its total cost of production would be performed by a small business concern in Haiti; the remainder of the work would be performed in New York. Upon considering this information, DLA rejected Penthouse's bid as nonresponsive for failure to comply with the terms of clause I24. DLA interprets this clause as requiring the clothing in question to be wholly manufactured in the United States. Penthouse contends that DLA's construction

is improper and consequently, that the agency incorrectly determined that the bid was nonresponsive.

Inclusion of the "Preference for Certain Domestic Commodities" clause in the solicitation is mandatory under 48 C.F.R. § 225.7002(b). This regulation implements the restriction routinely contained in Department of Defense (DoD) Appropriations Acts concerning the availability of appropriated funds for the purchase of articles of clothing; it literally repeats the language of the statutes. See, e.g., DoD Appropriations Act, 1985, Pub. L. No. 98-473, § 101(h) [§ 8019], 98 Stat. 1926 (1984). Except in circumstances not present here, funds provided in the act are not available for the procurement of any article of clothing "not grown, reprocessed, reused or produced in the United States or its possessions."

In a 1970 decision, our Office considered a protest concerning a similar restriction contained in the 1969 DoD Appropriations Act, Pub. L. No. 90-580 § 523, 82 Stat. 1120, 1133 (1969), and similar implementing regulations. See National Graphics, Inc., 49 Comp. Gen. 606 (1970). This decision involved the purchase of cotton lithographic pads by DLA. The protester's bid had been rejected because it offered pads comprised of domestic cotton, but manufactured in Japan. We noted that the procurement was subject to the restriction contained in the 1969 Appropriations Act and stated that the intent of the Congress in enacting the restriction was to consider an article of cotton or wool "American" only where the raw fiber, "as well as each successive stage of manufacture," was of domestic origin. Id. at 609. (Emphasis in original.)

Penthouse initially contends that this decision is not applicable to the protested procurement because of certain provisions of the Buy American Act, 41 U.S.C. §§ 10a-10d (1982), and implementing regulations. This act permits any contractor to compete for a given procurement regardless of the origin or place of manufacture of the product offered. See Software Automatic Corp., B-216395, Sept. 27, 1984, 84-2 CPD ¶ 363. However, it establishes a preference for products produced or manufactured in the United States to offset partially the competitive advantages often enjoyed by foreign competitors. See Dawson Construction Co., Inc., B-214070, Feb. 8, 1984, 84-1 CPD ¶ 160. This preference is implemented by the use of an evaluation differential that

is added to the price of the foreign item. See Autoclave Engineers, Inc., B-217212, Dec. 14, 1984, 84-2 CPD ¶ 668.

The specific FAR provision cited by Penthouse defines a "domestic end product" for the purpose of determining whether the differential should be applied to a particular bid or offer. This section, 48 C.F.R. § 25.101, provides in pertinent part:

"'Domestic end product,' as used in this subpart, means . . . an end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. (In determining if an end product is domestic, only the end product and its components shall be considered.)"

Penthouse argues that its clothing should be considered domestic under this definition and that it therefore complies with clause I24 of the protested solicitation.

In this case, however, the preference to be afforded domestic end products and the regulations defining such products are inapplicable. Under the terms of the Appropriations Act, DLA is prohibited from purchasing items not entirely manufactured in the United States. Consequently, whether Penthouse's bid would have qualified for a preference or been subject to application of an evaluation differential under the Buy American Act is irrelevant. Once Penthouse represented that it planned to manufacture a portion of the offered product in Haiti, DLA could not have considered Penthouse's bid.

In other words, the regulation Penthouse cites only defines the phrase "domestic end product" for purposes of the Buy American Act. It has no applicability to terms used in the Appropriations Act restriction. We recognize that the terminology used in the two statutory provisions is similar. We note, however, that the Appropriations Act provision is intended to be far more restrictive than the Buy American Act and, consequently, the terms used in the former provision are defined accordingly. See National Graphics, Inc., supra.

Penthouse further argues that the 1970 decision is not applicable to the present protest because it was based on the 1969 Appropriations Act and superseded regulations. Penthouse cites numerous examples in which agencies have allegedly awarded contracts to various entities despite statements by the offerors that they intend to perform a portion of the work in foreign countries.

We disagree. The restriction contained in the current Appropriations Act is virtually identical to that in the 1969 act. Further, we are not aware of any legislative action in the intervening years which would indicate that the Congress intended the 1985 restriction to be interpreted differently. Therefore, we find that the DoD, except in limited circumstances, is precluded from acquiring articles of clothing not manufactured entirely within the United States or its possessions. We deny the protest on this basis.

Penthouse also contends that this protest is distinguishable from the one in the 1970 case because of the applicability of the fourth proviso of the 1985 Appropriations Act restriction. This proviso states:

"That the Secretary specifically determines that there is a reasonable expectation that offers will be obtained from a sufficient number of eligible concerns so that awards of such contracts will be made at a reasonable price and that no award shall be made for such contracts if the price differential exceeds 2.2 percentum."

Penthouse concludes that, pursuant to this proviso, it should be awarded the contract because its bid was more than 2.2 percent below the next lowest one.

In reaching this conclusion, Penthouse misconstrues the purpose of the proviso. It is not intended, as Penthouse argues, to require Defense agencies to procure foreign-produced goods where the cost of domestic products is more than 2.2 percent higher. Rather, the intended purpose of this proviso is to permit Defense agencies, to a limited extent, to target procurements

subject to the Appropriations Act restriction to labor surplus areas. See H.R. Rep. No. 96-1528, 96th Cong. 2d Sess. 36-37, reprinted in 126 Cong. Rec. 32211 (1980); 126 Cong. Rec. 30756 (1980) (remarks of Sen. Levin). The proviso immediately preceding the one quoted above indicates this, referring to payment of a price differential on contracts "made for the purpose of relieving economic dislocation." For example, under the terms of the fourth proviso, a Defense agency may target a particular procurement for articles of clothing to labor surplus areas as long as the Secretary makes a specific determination that the cost of procuring the items in this manner will not exceed the cost of procuring them elsewhere in the United States by 2.2 percent. This proviso does not affect the prohibition on procurement of nondomestic clothing, and we therefore deny Penthouse's protest on this basis.

As for Penthouse's argument that Haiti is a designated country under the Caribbean Basin Economic Recovery Act, 19 U.S.C. § 2701, et seq. (1982), and the Trade Agreements Act of 1979, 19 U.S.C. § 2511, et seq. (1982), we note that these two acts do not affect the subject procurement. The first concerns duty free treatment to be afforded to products of countries designated as beneficiary countries by the President; the second sets forth numerous provisions designed to promote international trade. However, neither of these statutes contains a provision specifically exempting clothing produced in Haiti from the Appropriations Act restriction.

Penthouse further alleges that the solicitation was deficient because it did not include the standard clause entitled "Overseas Distribution of Defense Subcontracts," 48 C.F.R. § 252.204-7005. We find the protest on this basis untimely. Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1984), require protests based upon alleged improprieties that are apparent on the face of a solicitation to be filed before bid opening. DLA's failure to include the clause was evident from the face of the solicitation. Penthouse, however, protested this in its February 26, 1985, comments on the agency report. Since bid opening date was November 30, 1984, we will not consider the protest on this basis.

B-217480

The protest is denied in part and dismissed in part.

Harry R. Van Cleve
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General Counsel