

1100Y house
P/h2



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Westinghouse Electric Corporation

File: B-223992; B-223992.2

Date: September 4, 1986

DIGEST

The Department of Defense Federal Acquisition Regulation (FAR) Supplement, providing for a 50 percent factor to be utilized to evaluate offers of defense equipment which do not qualify for exemption from the provisions of the Buy American Act, is not inconsistent with the FAR, which sets forth factors of 6 and 12 percent, since the FAR allows agency heads to utilize other factors.

DECISION

Westinghouse Electric Corporation protests the awards of certain line items to Siemens Energy and Automation, Inc. and General Electric Company under invitation for bids (IFB) No. DACA87-86-B-0119, issued by the Army Corps of Engineers. The items in question are various types of circuit breakers. Westinghouse complains that the agency improperly applied a 50 percent Buy American Act evaluation factor to its bids for non-domestic origin circuit breakers, thereby displacing it as the low bidder. The firm contends that the 50 percent factor can only be utilized under the Balance of Payments Program to evaluate bids for supplies that will be used outside the United States. See the Federal Acquisition Regulation (FAR), 48 C.F.R. Subpart 25.3 (1985). Westinghouse contends that the use of the 50 percent factor here conflicts with the FAR.

We dismiss the protest.

The Buy American Act, 41 U.S.C. §§ 10a-10d (1982), creates a preference for the acquisition of domestic end products over foreign end products, unless it has been determined that it is inconsistent with the public interest to apply the Act to acquisitions of certain supplies from certain foreign countries. FAR, 48 C.F.R. §§ 25.102(a)(3) 25.103; see also J.I. Case Co., B-221588, et al., May 5, 1986, 86-1 CPD ¶ 430. The Department of Defense Supplement to the Federal Acquisition Regulation (DOD FAR Supp.), 48 C.F.R. § 225.102, recognizes this preference for domestic end products except

036590 - 130906

where offers are for foreign end products which are exempt from the provisions of the Buy American Act as "qualifying country end products." (Generally, "qualifying countries" are NATO members and certain other countries with which the United States has cooperative defense and foreign military sales/offset agreements. DOD FAR Supp., 48 C.F.R. § 225.001.) Accordingly, DOD FAR Supp., 48 C.F.R. § 225.105(1), provides, in pertinent part, that each non-qualifying country offer of defense equipment shall be adjusted for purposes of evaluation either by excluding any duty from the nonqualifying country offer and by adding 50 percent of the offer (exclusive of duty) to the remainder, or by adding to the nonqualifying country offer (inclusive of duty) a factor of 6 percent of that offer, whichever results in the greater evaluated price.

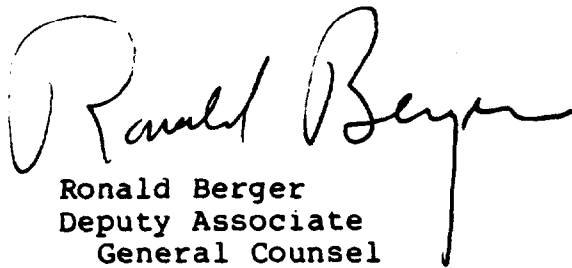
In its bid, Westinghouse identified the country of origin of its offered circuit breakers as "primarily Japan," and these items, accordingly, were not "qualifying country end products" exempt from the provisions of the Buy American Act. Therefore, we fail to see how the agency acted improperly, in the face of the clear language of DOD FAR Supp., 48 C.F.R. § 225.105(1), supra, by applying the 50 percent evaluation factor to Westinghouse's bids for those items (exclusive of duty) if such application resulted in a greater evaluated price for Buy American Act purposes.

It is true that the FAR refers to the 50 percent factor only in connection with the balance of payments program and that in connection with the Buy American Act, the FAR provides that the prices for domestic end products are deemed to be unreasonable when the lowest acceptable domestic offer exceeds the lowest acceptable foreign offer, inclusive of duty, by (1) more than 6 percent, if the domestic offer is from a large business that is not a labor surplus area concern; or (2) more than 12 percent, if the domestic offer is from a small business concern or any labor surplus area concern. FAR, 48 C.F.R. § 25.105(a). However, there is no conflict between the DOD FAR Supp. and the FAR. Section 2(c)(1) of Executive Order No. 10582, Dec. 17, 1954, which implements the Buy American Act, provides for the addition of a 6 percent evaluation factor to foreign end product offers; however, section 5 of the order states that:

" . . . In any case in which the head of an executive agency . . . determines that a greater differential than that provided in this order . . . is not unreasonable . . . this order shall not apply."

The FAR, 48 C.F.R. § 25.105(a), in turn, provides that adjustments to foreign offers through application of the 6 and 12 percent evaluation factors referenced above shall serve to indicate the unreasonableness of a domestic product price "[u]nless the agency head determines otherwise". Accordingly, the 50 percent evaluation factor set forth in the DOD FAR Supp. simply reflects the Secretary of Defense's determination that offers of domestic defense products which do not exceed the price of foreign products when appropriately adjusted by that factor are not unreasonable in price.

Since we see no conflict between the FAR and DOD's supplemental provisions, we conclude that Westinghouse has failed to state a valid basis to protest the agency's application of the 50 percent evaluation factor to its bids for circuit breakers which are other than "qualifying country end products." The protest therefore is dismissed pursuant to 4 C.F.R. § 21.3(f) (1986).



Ronald Berger
Deputy Associate
General Counsel