



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Rudel Machinery Co., Inc.
File: B-224606
Date: November 6, 1986

DIGEST

1. General Accounting Office will not review agency determination not to waive Buy American Act requirements since Buy American Act vests discretion as to waiver in the head of the concerned agency.
2. General Accounting Office will not review contracting agency's affirmative determination of contractor's responsibility absent showing of possible fraud or bad faith on the part of procuring officials or allegation that the solicitation contained definitive responsibility criteria that allegedly were not applied.

DECISION

Rudel Machinery Co., Inc. (Rudel), protests a determination by the Department of the Army not to waive the restrictions of the Buy American Act, 41 U.S.C. § 10a-d (1982), under invitation for bids (IFB) No. DAAA22-85-B-9014. The Buy American Act provides that the United States government is to acquire supplies manufactured in the United States unless the head of the procuring agency determines the acquisition to be inconsistent with the public interest or the cost to be unreasonable. We dismiss the protest.

The Army issued the IFB as a two-step sealed bid procurement for a "bore evacuator drilling machine" for the Army's Watervliet Arsenal. Two offerors, Rudel and Accurate Machine Tool, Inc. (Accurate), were selected for participation in the sealed bid, second step of this procurement, having submitted acceptable proposals under step one. Accurate, a small business and a domestic manufacturer located in a labor surplus area, offered its own equipment. Rudel offered equipment manufactured in Switzerland.

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The second-step IFB contained the clause entitled "Buy American Act and The Balance of Payments Program" found at paragraph 52.225-7001 of the Department of Defense Supplement to the Federal Acquisition Regulation (Defense Acquisition Circular 84-10, Jan. 10, 1985). Under the terms of this clause, the Army was required to add 50 percent to Rudel's bid, for evaluation purposes, unless applicability of the Buy American Act was waived.

The Assistant Secretary of the Army for Research, Development and Acquisition determined not to grant a waiver of the Buy American Act in this instance. In this respect, there is no agreement that mandates waiver of the act for the equipment being acquired under this solicitation. The determination signed by the Assistant Secretary states:

"Based upon the President's recent decision to seek Voluntary Restraint Agreements on machine tool imports from Switzerland and other countries, and that fact that Accurate Machine Tool, Inc. is a small business concern in a labor surplus area, I have determined that a waiver of the Buy American Act is not in the best interest of the US Government."

The addition of the 50 percent differential under the Buy American Act displaced Rudel as the low bidder, and the contract was awarded to Accurate. The Army has suspended performance pending our resolution of the protest.

Rudel contends that the Assistant Secretary's determination was improper. Rudel states that the equipment being acquired here does not fall within the categories of machine tools for which Voluntary Restraint Agreements are being sought and asserts that the basis for the determination was therefore erroneous. Rudel also argues that, irrespective of waiver, the Buy American Act clause incorporated in the IFB provides specifically for the addition of a 12-percent differential where the domestic-item bidder is a small business or labor surplus area concern, and states that its bid would be low if this differential was applied. Rudel further asserts that the determination fails to reflect consideration of the added advantages of parts interchangeability, etc., which would accrue through acquisition of its equipment because the arsenal already has another machine of the same type. The

Government of Switzerland has joined in support of Rudel's protest.

Initially, we point out that Rudel is wrong in its assertion that, even without waiver, the 12-percent evaluation factor provided for in the IFB's Buy American Act clause should apply. The clause requires application of either a 50-percent factor exclusive of duty or, where the domestic bidder is a small business or labor surplus area firm, a 12-percent factor inclusive of duty, whichever results in the greater evaluated price; the 50-percent factor thus is appropriate here.

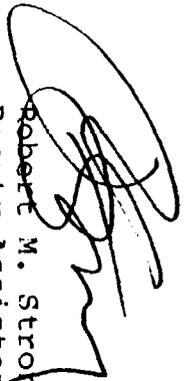
Absent a blanket waiver of the Buy American Act through an intergovernmental agreement, the question of whether to waive the act in any particular procurement involves balancing competing buy-American and foreign policies to determine what is in the public interest. See General Motors of Canada Limited, B-212884, Oct. 7, 1983, 83-2 C.P.D. ¶ 427. The Buy American Act clearly vests the discretion to make the waiver decision in the head of the agency. Israel Military Industries, B-211761, Nov. 21, 1983, 83-2 C.P.D. ¶ 598. We have consistently held, because this discretion is vested in the heads of the agencies by statute, that we will not review determinations not to waive the requirements of the act. See, e.g., Brown Boveri Corp., 56 Comp. Gen. 596 (1977), 77-1 C.P.D. ¶ 328; General Motors of Canada Limited, B-212884, supra; Israel Military Industries, B-211761, supra.

Consequently, we will not consider the merits of Rudel's argument that waiver is appropriate here. We note, however, that the added factors which Rudel and the Government of Switzerland contend were not considered in this determination were brought to the attention of the Assistant Secretary by representatives of the Swiss government in conjunction with a request for reconsideration of his determination not to waive the act, and the Assistant Secretary subsequently denied the request.

The protester also contests the Army's determination that Accurate is responsible, i.e., is capable of meeting its obligations under the contract. We will not review an agency's affirmative determination of a contractor's responsibility absent a showing of possible bad faith or fraud on the part of procuring officials or that the solicitation contained definitive responsibility criteria that allegedly were

not applied. Industrial Maintenance Services, Inc.,
B-223300, June 24, 1986, 86-1 C.P.D. ¶ 588. Neither
exception applies here.

The protest is dismissed.



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General Counsel