



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Leland Limited, Inc.
File: B-224175
Date: December 24, 1986

DIGEST

For purposes of the Trade Agreements Act, an offer of a designated country's end products is subject to application of a Buy American Act differential where the offered price is less than the dollar threshold established pursuant to the Trade Agreements Act, but should be evaluated at no more than the threshold.

DECISION

Leland Limited, Inc., protests the award of a contract to Sparklet Devices, Inc. under invitation for bids (IFB) No. DLA700-86-B-0077, issued by the Defense Construction Supply Center, Defense Logistics Agency (DLA), for carbon dioxide cylinders used to inflate pneumatic flight vests. Leland challenges DLA's application of the Buy American Act, 41 U.S.C. §§ 10a-10c (1982), and the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2582 (1982), in the evaluation of its bid.

We sustain the protest.

The solicitation was issued on January 9, 1986. It incorporated by reference the provisions at Department of Defense (DOD) Federal Acquisition Regulation (FAR) Supplement, 48 C.F.R. § 252.225-7001 and -7006 (1985), which implement the Buy American and Trade Agreements Acts. The Buy American Act and its regulations provide a preference for domestic items in government procurement by requiring the application of a percentage factor to the offer of a foreign end product. Under the Trade Agreements Act of 1979 and its implementing regulations, the provisions of the Buy American Act do not apply to eligible products originating in designated countries in certain situations. Both of the incorporated provisions refer to part 25 of the FAR for the actual procedure to follow in evaluating offers; under the procedure, the Buy American Act differential is not applied where the eligible offer is \$149,000 or more.

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Leland submitted a bid of \$130,311, and certified that it would supply cylinders of Japanese origin that qualify as designated-country end products under the Trade Agreements Act. Because Leland's total bid price did not exceed the Trade Agreements Act threshold of \$149,000, DLA concluded it had to apply the Buy American Act differential of 50 percent, after deducting duty, to Leland's price. Sparklet, the only other responsible bidder, submitted a bid of \$160,189, and certified that it was offering a domestic end product, an assertion confirmed by DLA. Sparklet was found to be the lowest responsive, responsible bidder, and was awarded a contract.

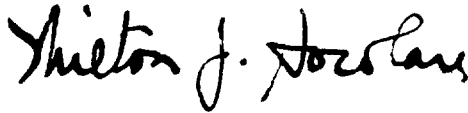
Although the Buy American Act was enacted to establish a legal preference for domestic products over foreign ones, 41 U.S.C. § 10a, the later-enacted Trade Agreements Act of 1979 was intended to forego the preference where a specified group of foreign countries is involved, *i.e.*, to avoid treating their products less favorably than domestic products are treated. See 19 U.S.C. § 2511. The FAR provision at 48 C.F.R. § 25.402(a) implements that intention by providing that "agencies shall evaluate offers at or over the dollar threshold . . . without regard to the restrictions of the Buy American Act" While we recognize that DLA's action in this procurement is consistent with a literal reading of the FAR, we think the agency's view that pursuant to the regulation it must evaluate any bid below the \$149,000 threshold by applying the full Buy American Act differential of 50 percent is untenable.

DLA acknowledges that if Leland had bid \$149,000 instead of \$130,311, the Buy American Act differential would not have been applied and Leland would have been the lowest evaluated bidder. As a result, not only is a bid like Leland's evaluated higher than a domestic end product bid of \$160,189, but it would be evaluated higher than a bid based on cylinders of Japanese origin at \$149,000.

In our view, however, if an eligible foreign-item bid of \$149,000 would win a competition against a domestic bid of \$160,189, it only makes sense that an eligible foreign-item bid of \$130,311 also will win. Thus, the proper reading of the regulation, in terms of its background and purpose, is that while bids below the threshold are subject to a differential, the differential is applied, in evaluating them against domestic-item bids, only up to the threshold. That is, to achieve a reasonable result under the FAR, a bidder offering an eligible product at a bid price below the specified threshold should be evaluated, against a domestic

bid, with the Buy American Act differential added, but the total evaluated bid may not exceed the dollar threshold.

The protest is sustained. By separate letter to the Director of DLA, we are recommending that the agency terminate Sparklet's contract and award a contract under the IFB to Leland. We also are recommending to the FAR Secretariat that the regulation applied here be clarified appropriately.

A handwritten signature in black ink, reading "Milton J. Norcross". The signature is written in a cursive style with a large, stylized "M" and "N".

Acting Comptroller General
of the United States