The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Richlyn Laboratories, Inc.

File: B-225046

Date: January 29, 1987

DIGEST

Agency determination whether a component is available in the United States for purposes of the Buy American Act must be based on whether the component is mined, produced, or manufactured in the United States in reasonable commercial quantities and not whether it is available from a qualifying country.

DECISION

Richlyn Laboratories, Inc. (RLI) protests the award of a contract to Barr Laboratories, Inc. (Barr) by the Defense Personnel Support Center, Defense Logistics Agency (DLA), Philadelphia, Pennsylvania under invitation for bids (IFB) No. DLA120-86-B-1605 for 71,604 bottles of hydrochlorothiazide tablets. RLI contends that it offered a domestic end product manufactured in the United States with a component from a qualifying country, exceeding 50 percent of the costs of all components, under the Buy American Act, 41 U.S.C. § 10a-d (1982), and therefore should have been evaluated with the Buy American preferences as the low, responsive, domestic offeror entitled to the award.[1]/

DLA, however, determined that the Buy American Act did not apply to the procurement because the major component in question, a foreign drug, was not produced in the United States in sufficient and reasonably available commercial quantities. Accordingly, DLA proceeded to make an award to the low offeror (evaluated without the Buy American Act preferences) which offered an end product manufactured in the

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1/ The Department of Defense has determined under the Buy American Act that it is inconsistent with the public interest to apply the restrictions of the Act to its acquisition of certain supplies mined, produced, or manufactured in certain countries. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 25.103 (1986). These countries have been designated as "qualifying countries." See Department of Defense FAR Supplement, 48 C.F.R. § 225.001 (1986).

United States with the foreign drug component, exceeding 50 percent of the costs of all components, from a nonqualifying country. Thus, the propriety of the agency's decision not to apply the Buy American Act is an issue.

We deny the protest.

The solicitation contained the standard Buy American Act clause (48 C.F.R. § 252.225-7006 (1986)) which generally gives preferences to domestic end products over foreign end products except, as noted above, for certain foreign end products which meet the requirements for classification as qualifying country end products. Seven bids were received. The two low bids were as follows:

Firm	Bid Price (per bottle)	Source of Active Ingredient (more than 50 percent of costs of all components)
Barr	$2.90	Yugoslavia/Italy
RLI	$2.95	Italy

The other five bidders also offered foreign sources for the end item's active ingredient with costs for the ingredient exceeding the costs of all other components of the end product. In accordance with our decision in Airpro Equipment, Inc., B-209612, Jan. 31, 1983, 83-1 CPD ¶ 105, the contracting officer interpreted the Barr bid as supplying the major component from a nonqualifying country because the bid could reasonably be construed to permit the bidder to furnish either a qualifying (Italian) or a nonqualifying (Yugoslavian) component. Further, since RLI proposed a qualifying country as the source for the active ingredient, the contracting officer determined that the RLI bid was an offer for a domestic end product which is defined as including an end product manufactured in the United States if the costs of its qualifying country components and any United States components together exceed 50 percent of the costs of all its components. See Department of Defense FAR Supplement, 48 C.F.R. § 225.001.

However, since all seven bidders proposed foreign sources (some albeit qualifying country sources) for the active ingredient, the Directorate of Medical Material, under authority granted by the regulation in cases concerning foreign drugs (see Department of Defense FAR Supplement, 48 C.F.R. § 225.102 (72)(2), determined that the Buy American Act did not apply to the procurement in question because the

component was a class or kind not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities. Accordingly, the Buy American preferences were not invoked in favor of RLI against the foreign bid of Barr which therefore received the award. This protest followed.

RLI argues that since it offered a domestic end product with a qualifying country component, DLA could not consider the component unavailable because the qualifying country component was the "contextual equivalent of a domestic component." In other words, RLI is arguing that an end product manufactured in the United States with a qualifying country component should be treated for all purposes as a purely domestic end product with domestic components, even for purposes of determining availability of that component in the United States under the Buy American Act.

We reject this argument. The regulations do define domestic end product as including a product manufactured in the United States with qualifying country components. However, the applicable regulation, entitled "Nonavailability in the United States," (48 C.F.R. § 225.102(70)(3)), does not include consideration of qualifying country components for purposes of determining whether the Buy American Act applies in the first instance. That regulation states, in part, as follows:

> "The Buy American Act does not apply to. . . (ii) components of end products manufactured in the United States or a qualifying country if the component is of a class or kind determined by the Government to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities . . .."

Thus, we think that a determination of nonavailability of a component in the United States must be made on the basis of whether the component is mined, produced or manufactured in the United States in sufficient and reasonably available commerical quantites and not whether it is available from a qualifying country. Accordingly, we think the contracting officer properly declined to apply the Buy American Act in favor of the RLI bid.

Finally, RLI, after bid opening, found a domestic supplier of the active ingredient and now argues that the component is available domestically. However, since all seven bids received offered foreign sources for the component, we think

that the Directorate of Medical Material reasonably determined that the component was "not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities." The fact that the protester found one domestic source after bid opening does not detract, in our view, from the reasonableness of the agency's determination.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel