

Maris #L-77



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Technical Systems, Inc.
File: B-225143
Date: March 3, 1987

DIGEST

1. Buy American Act differential is not applicable to items that are included in the Memorandum of Agreement between the United States and Israel as items for which application of the Act has been waived. Restriction on waiver of the Act for mobilization base items does not apply where quantity of items acquired exceeds that required to maintain the mobilization base.

2. There is no requirement that a contracting agency equalize whatever competitive advantage a foreign firm may have because it may be subsidized by a foreign government or because it is not subject to the same socio-economic requirements as domestic firms.

DECISION

Technical Systems, Inc. (TSI) protests the Department of the Army's contract award to Elbit Computers, Ltd. under request for proposals (RFP) No. DAAA09-86-R-0789 for electronic units for the laser range finder system. TSI primarily asserts that in making the award to Elbit, an Israeli firm, the Army improperly waived the preference for acquisition of domestic end products established by the Buy American Act, 41 U.S.C. §§ 10a-10d (1982). We deny the protest.

Department of Defense (DOD) regulations implementing the Buy American Act for DOD procurements generally provide for an evaluation preference for domestic end products over those of other, "nonqualifying" countries. DOD Federal Acquisition Regulation (FAR) Supp., 48 C.F.R. § 225.105 (1985). Specifically, the regulations require that nonqualifying country offers be adjusted for purposes of evaluation by excluding any duty from the nonqualifying country offer and by adding 50 percent of the offer (exclusive of duty) to the

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remainder, or by adding to the nonqualifying country offer (inclusive of duty) 6 percent of that offer, whichever results in the greater evaluated price. Id.

A "qualifying" country includes a defense cooperation country for which the Secretary of Defense has waived the Buy American Act preference for a list of mutually agreed items. DOD FAR Supp., 48 C.F.R. § 225.001. Israel is such a country. DOD FAR Supp., 48 C.F.R. § 225.7501. Under a Memorandum of Agreement (MOA) entered into between the United States and Israel, offers for Israeli products that are listed in Annex B to the MOA are to be evaluated without applying the price differentials established by the Buy American Act.

Elbit did not complete the Buy American-Balance of Payments Program certificate in the RFP, which required that an offeror list each offered end product that was not a domestic end product. Instead, Elbit inserted a notation that the certificate was not applicable, and referred to the MOA between Israel and the United States.

In evaluating Elbit's offer, the Army did not apply any price differential under the Buy American Act. In this connection, the Army notes that the electronics unit being procured is part of the laser range finder system, and that the laser range finder system is included in Annex B of the MOA with Israel. TSI asserts, however, that the Army nevertheless was required to apply the Buy American Act differentials in evaluating Elbit's offer because the laser range finder system is a mobilization base item. TSI notes that the MOA with Israel specifically states that incorporation of an item in Annex B serves to document an exemption from the Buy American Act unless, among other things, the procurement is for a mobilization base item. Further, TSI points out that the DOD FAR Supp., 48 C.F.R. §§ 225.7405 and 225.7502, provides that the policies and procedures providing for waiver of the Buy American Act for defense cooperation agreement country end products do not apply to the mobilization base items listed in 48 C.F.R. § 225.7405, one of which is the laser range finder system.

The Army asserts that TSI mischaracterizes the scope of section 225.7405, which actually provides that:

"the policies and procedures of this subpart [providing for waiver of the Buy American Act differentials] do not apply to offers of the following items of defense equipment unless the quantity being acquired is greater than that required to maintain the U.S. defense mobilization base." (Emphasis added.)

The Army states that this procurement is for the electronics units as spare parts for the laser range finder system and is not necessary to maintain the mobilization base, as evidenced by the fact that the solicitation was not restricted to mobilization base producers. The Army also emphasizes that the list of excluded items in section 225.7405 does not include components or spare parts for the laser range finder system, and asserts that where components of end items also are covered, they are listed separately, e.g. "Missiles and Missile Components," "Machine Gun M240 Spare Parts."

We agree with the Army that since the electronic units were not being acquired to maintain the mobilization base, the waiver of the Buy American Act price differentials was proper. As the Army notes, 48 C.F.R. § 225.7405 does not prohibit waiver of the Buy American Act for the listed items. Rather, it provides that the Act shall be waived only when the number of items to be purchased exceeds that required to maintain the mobilization base.

Furthermore, TSI has offered no rebuttal to the agency's contention that the electronic units are not necessary to maintain the mobilization base. Decisions as to the restrictions required to meet the needs of industrial mobilization must be left to the discretion of military agencies, and we will question those decisions only if the evidence convincingly shows that the agency has abused its discretion. Urdu Industries, Ltd., B-222421, June 17, 1986, 86-1 CPD ¶ 557. Accordingly, in the absence of any evidence refuting the agency's position that the units are not required to meet the needs of industrial mobilization, we find no basis to conclude that waiver of the Buy American Act differentials for Elbit, as a firm offering a qualifying country end product, was improper.

TSI also asserts that the award was improper here because the RFP did not contain the MOA between Israel and the United States and therefore, offerors lacked any notice that not all foreign offers would be subject to the Buy American Act differentials. We are aware of no requirement that MOAs between the United States and foreign countries be included in solicitations subject to foreign competition. Moreover, the Buy American-Balance of Payments Program certificate included in the RFP specifically states that offers will be evaluated by giving preference to domestic end products and foreign qualifying country end products over foreign nonqualifying country end products. Accordingly, offerors in fact were on notice that qualifying country offers would be given an evaluation preference. We therefore find no merit to the protester's contention in this regard.

TSI contends that Elbit received an unfair competitive advantage because it is not required to comply with the same terms and conditions as American companies. Specifically, TSI cites such RFP clauses as Utilization of Small Business Concerns, Utilization of Labor Surplus Area Concerns, Walsh-Healey Public Contracts Act and Clean Air and Water. TSI also alleges that Elbit bid below cost and as a result will require support from the Israeli government, which in turn receives support from the U.S. Government.

We have consistently held that there is no requirement that procuring activities equalize whatever competitive advantages foreign firms may have because they are not subject to the same socio-economic requirements (such as those cited by TSI) as domestic firms. See Pall Land and Marine Corp. et al., B-223478 et al., July 16, 1986, 86-2 CPD ¶ 77; Pyrotechnics Industries, Inc., B-221886, June 2, 1986, 86-1 CPD ¶ 505. Similarly, there is no requirement that an agency offset foreign government subsidies in evaluating proposals other than through application of the Buy American Act, which does not apply here. Id. Accordingly, we also find that this aspect of the protest lacks merit.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel