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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Golten Marine Co., Inc.

File: B-228398

Date: December 22, 1987

DIGEST

1. Where examination of record reasonably shows that bidder was sent bid package and received it and protester fails to persuasively rebut evidence of receipt, protest that potential bidder failed to receive solicitation is denied.
2. Award to firm furnishing foreign parts under solicitation does not violate Buy American Act where agency has determined that exception which permits use of foreign parts where domestic-end product is not of satisfactory quality is applicable.
3. Procurement by private foreign concern using its own funds is not a federal procurement and, therefore, protest of that procurement is not reviewable under General Accounting Office bid protest jurisdiction.

DECISION

Golten Marine Co., Inc., protests award of a contract by Barber Ship Management, Inc., as agent for the United States Maritime Administration (MARAD), for engine repair work on three vessels to be part of the National Defense Reserve Fleet (NDRF). Golten contends that it never received the solicitation and that the solicitation and award was contrary to the Buy American Act. Golten also contends that Barber made an improper noncompetitive award for engine start-up on these three ships. Golten requests a resolicitation for both requirements so that it may have the opportunity to bid.

We deny the protest against the contract for engine repair work, and dismiss the protest against the award for engine start-up.

On September 8, 1987, Barber issued a solicitation for engine repair work for the vessels "Cape Diamond," "Cape Decision," and "Cape Domingo" with a September 15 bid

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opening date. Two bids were received and award was made to the low bidder on September 25. Golten telephoned Barber on September 25 to say that it never received a solicitation. By letter of September 30, Golten protested to Barber the failure of Golten to be solicited. On October 1 Golten filed its first protest with our Office concerning the nonreceipt of the solicitation. On October 6 Golten filed another protest with our Office and alleged that the specifications for spare parts in the September 8 bid package were contrary to the Buy American Act because the parts required were manufactured only in France. On October 8 Golten filed a third protest alleging an unauthorized sole-source award for engine start-up on the three vessels in issue.

The procedure for the accomplishment of vessel repairs as administered by MARAD is set forth in 46 C.F.R. part 338 (1986). In brief, this procedure allows independent contractors to be listed and qualified on a yearly basis to make vessel repairs after their application for a Master Lump Sum Repair Contract has been approved. Notice of the annual listing requirement is publicized in the Commerce Business Daily. Depending on geographical area and factors of scope and nature of work, location of vessel, and time and expense involved in shifting and returning the vessel to its loading berth, MARAD exercises its administrative judgment to determine which contractors meet the requisites for a particular solicitation. Bid packages are then sent to all contractors holding Master Lump Sum Repair Contracts which MARAD thinks can meet its needs and to any other firm expressing an interest in a particular solicitation.

Golten contends that it failed to receive a copy of the September 8 solicitation and requests resolicitation so that it can compete for the work. MARAD indicates that the solicitation was mailed to all potential bidders on MARAD's qualified list, including Golten. MARAD has produced a delivery receipt, the carrier's delivery log and a copy of Barber's cover letter dated September 8, addressed to Golten, transmitting the solicitation. The delivery records show that the package was delivered on September 9 to Golten's address and to a Golten employee. During the course of this protest, Golten has attempted to rebut this evidence; however, Golten's position has not been consistent. In a telephone call to Barber on September 25, Golten's representative initially advised it received no bid package. When advised that Barber had documents showing Golten's receipt of the solicitation, Golten claimed it received an empty envelope. When asked by the Barber representative why Golten had delayed so long in raising the issue of nonreceipt, Golten's representative stated that the envelope had contained the wrong bid package, a solicitation

for a fourth vessel. At the bid protest conference, Golten claimed that it received a bid package for smoke detectors. MARAD reports that the solicitation was not issued until September 10, so that it could not have been delivered in the envelope on September 9. Given the contradictory representations of the protester contained in the record, we think it is reasonable to conclude that Golten actually did receive the correct bid package on September 9, but that it inadvertently lost or misplaced it. Under these circumstances, we cannot say the agency's actions were improper.

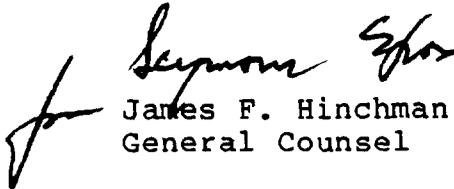
In any event, Golten's nonreceipt of the IFB would not be a basis for sustaining the protest. A procuring agency's failure to solicit a potential bidder does not provide a compelling reason for resolicitation absent a showing that the agency made a deliberate attempt to preclude the bidder from competing, did not make a significant effort to obtain adequate competition, or failed to obtain reasonable prices. Ansonia Copper & Brass, Inc., B-227002, July 23, 1987, 87-2 CPD ¶ 76; G&L Oxygen and Medical Supply Services, B-220368, Jan. 23, 1986, 86-1 CPD ¶ 78.

At a minimum, the agency has shown that it attempted to solicit Golten. There has been no showing that Golten's failure to receive the IFB was due to a deliberate or conscious attempt to preclude the protester from competing on the procurement and, accordingly, we see no basis to require a resolicitation of the requirement. Since adequate competition was obtained and there is no evidence which suggests that the bid prices received were not reasonable, we find this protest basis without merit.

Golten's contention that the contract award for engine repair violates the Buy American Act by specifying use of foreign parts for the repair work is without merit. Golten points out that the General Agency Agreement between Barber and MARAD requires use of domestic products generally unless the products are not available in the United States in sufficient and reasonably available quantities and of satisfactory quality. Here, MARAD indicates that the ships and the ship diesel engines are foreign built with foreign components. MARAD determined that the available domestic spare parts may not fit properly and that this obviously raised concerns regarding their use. The spare parts are maintained on board the vessels for emergency repairs. MARAD states that the requirement that the spare parts will perform properly is crucial since the ship must operate on a self sufficient basis during war and emergency circumstances. Under these circumstances, we conclude the agency's award to a firm using foreign parts was not improper since it represented the agency's legitimate needs.

As to Golten's allegation of an improper sole-source award for engine start-up, MARAD states that it has not entered into any contract for engine start-up on the three vessels in question. MARAD's conference comments make it clear that the work complained of by Golten is work contracted for by the foreign private seller of these vessels to satisfy a MARAD requirement before the sale is effected. Thus, the record shows that a contract was not issued by MARAD or its agent nor are federal funds involved. Because this is not a procurement by a federal agency of property or services under the Competition in Contracting Act of 1984, we will not consider this allegation. See 31 U.S.C. § 3551-3556 (Supp. III 1985); The Alaska Native Architectural & Engineering Co., B-224626, Sept. 26, 1986, 86-2 CPD ¶ 363. While the protester argues that this contract is a federal procurement there is no evidence in the record supporting this contention.

The protest against the engine repair contract is denied and the protest against the engine start-up contract is dismissed.


James F. Hinchman
General Counsel