The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Questek, Inc.

File: B-232290

Date: August 19, 1988

DIGEST

1. Agency's failure to apply Buy American Act evaluation factor to offer based on a Canadian product does not provide a valid basis for protest since applicable regulations exempt Canadian products from Buy American Act requirements.

2. Offeror who relies on erroneous oral advice from agency concerning applicability of Buy American Act evaluation requirements to Canadian products does so at its own peril where solicitation warned that oral advice would not be binding. Moreover, offeror was on constructive notice of the regulation setting forth exemption for Canadian products because the regulation was published in the Federal Register.

DECISION

Questek, Inc., protests the award of a contract by the Air Force under request for proposals (RFP) No. F33601-88-R-A063. Questek complains that offers were evaluated in a manner inconsistent with the advice it received from the contracting agency. We dismiss the protest.

The solicitation sought offers on a brand name or equal basis for a laser. The protester states that it called the buyer for this procurement to verify that the brand name laser is manufactured in Canada and to inquire as to whether an evaluation factor would be added to the price of the brand name offer pursuant to the Buy American Act. According to the protester, the buyer subsequently orally advised on two occasions that a 12 percent evaluation factor would be added to offers based on the brand name product.

The protester states that it offered its own laser at a price of $41,650, but that the agency made award to the brand name manufacturer at a price of $39,900. Questek points out that if a 12 percent factor had been added to the brand name offer, Questek's evaluated price would have been

low. Questek, a small business, requests that it be awarded the contract on this basis.

The Buy American Act, 41 U.S.C. § 10a-d (1982), provides generally that only domestic products are to be acquired for public use unless they are unreasonably priced. The implementing regulations provide for the use of evaluation factors to determine if a domestic product is unreasonably priced. The regulations applicable to Department of Defense procurements essentially provide that offers of products from certain foreign countries are to be adjusted by the use of either a 50 percent evaluation factor exclusive of duty or a 6 percent factor inclusive of duty, except that a 12 percent factor is to be used in lieu of the 6 percent factor if the firm submitting an offer for a domestic product is a small business or a labor surplus area concern. See Defense Federal Acquisition Regulation Supplement (DFARS) § 25.105 (DAC 86-6, Sept. 1, 1987). Those regulations, however, have for many years exempted supplies produced or manufactured in Canada from the Buy American Act requirements. See DFARS § 25.7101. Accordingly, the Air Force acted properly in not adding an evaluation factor to the brand name supplier's offer.

With respect to what the protester allegedly was told by the buyer, the solicitation, in the Explanation to Prospective Offerors clause found at Federal Acquisition Regulation § 52.215-15, which was incorporated into the RFP by reference, warned that oral explanations given before award would not be binding, and we have frequently held that in circumstances such as we have here offerors rely upon oral advice at their own risk. See, e.g., Inventive Packaging Corp., B-213439, Nov. 8, 1983, 83-2 CPD ¶ 544. Moreover, under the law Questek must be deemed as being on constructive notice of the provisions of DFARS § 25.7101 since the regulation was published in the Federal Register and appears in title 48 of the Code of Federal Regulations at section 225.7101. See Tri-State Laundry Services, Inc., B-218042, Feb. 1, 1985, 85-1 CPD ¶ 127, affirmed, B-218042.2, Mar. 11, 1985, 85-1 CPD ¶ 295.

Accordingly, the facts as set forth by Questek do not establish a valid basis for protest. Therefore, pursuant to 4 C.F.R. § 21.3(m) (1988), the protest is dismissed.

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