Rebbe

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tic-La-Dex Business Systems, Inc.

File: B-235016.2

Date: October 6, 1989

DIGEST

1. Whether the dollar threshold for applying the Trade Agreements Act properly has been met is determined by reference to the estimated value of the entire acquisition, not the potential value of an offeror's individual contract.

2. Solicitation clause that instructs procuring agency to resolve tie offers in favor of small business concerns does not establish a preference program for such concerns which would remove the procurement from application of the Trade Agreements Act.

3. Foreign product which is substantially transformed into a different item in the United States does not become a designated country end item for purposes of the Trade Agreements Act.

DECISION

Tic-La-Dex Business Systems, Inc., protests the rejection of the offer it submitted in response to General Services Administration (GSA) solicitation No. FCGA-F2-IF300-N-8-4-87.

We deny the protest.

The solicitation was issued on June 5, 1987, as part of the International Federal Supply Schedule (IFSS) Program to establish sources to provide a variety of supplies for overseas GSA customers. The solicitation called for the supply of 54 Special Item Numbers (SINs)listed in Section B of the IFSS. The solicitation provided that the contract award period would be from December 1, 1987, or date of award, whichever was later, through November 30, 1990. The solicitation also provided that additional offers from new suppliers would be considered during two open seasons. On April 28, 1988, GSA issued amendment No. 3 to the

solicitation, which established the first open season for the receipt of new offers. The notice announcing the open season provided that the contract award period for open season offerors would be from December 1, 1988, or date of award, whichever was later, through November 30, 1990.

The solicitation contained Federal Acquisition Regulation (FAR) § 52.225-8, "Buy American Act-Trade Agreements Act-Balance of Payments Program Certificate," and FAR § 52.225-9, "Buy American Act-Trade Agreements Act-Balance of Payments Program." These clauses relate to the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2582 (Supp. IV 1986), and its implementing regulations, FAR subpart 25.4, which prohibit federal agencies from purchasing certain products which originate in non-designated foreign countries where the items' total price exceeds a dollar threshold established by the United States Trade Representative. FAR § 52.225-8 required offerors to specify the country of origin of any foreign end product offered and to otherwise certify that they were offering domestic end products. FAR § 52.225-9 contained relevant definitions of "designated country end product," "domestic end product," and "foreign end product."

On June 25, 1988, Tic-La-Dex submitted an offer under the open season amendment for various items falling within SIN B75, Office Supplies. In its FAR § 52.225-8 certificate, Tic-La-Dex indicated a point of production of the offered items by country and production percentage which showed that it was offering products that were at least 50 percent the product of South Africa or Taiwan. GSA contacted Tic-La-Dex concerning its certification so that GSA could determine whether to apply the Trade Agreements Act. Ongoing correspondence between the parties followed in which GSA and Tic-La-Dex disagreed as to whether the Act applied at all, and in which, according to GSA, Tic-La-Dex failed to supply an adequate certification. By letter dated June 13, 1989, GSA rejected Tic-La-Dex's offer. On June 21, Tic-La-Dex protested to our Office that its offer was improperly rejected because the Trade Agreements Act does not apply to the present solicitation and because, in any event, the products the firm offered are end items from a designated country and thus qualify under the Act.

As a preliminary matter GSA argues that we should dismiss the protest as untimely because Tic-La-Dex knew no later than May 19, 1989, when the firm received a letter from GSA, that GSA intended to apply the Trade Agreements Act to its offer, but did not file a protest until June 26, more than 10 working days later. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1989). We disagree. On May 21,

within 10 working days after Tic-La-Dex received GSA's letter, Tic-La-Dex submitted a response to GSA. While this letter did not explicitly state that it was a protest, it clearly expressed Tic-La-Dex's disagreement with GSA's position concerning the applicability of the Trade Agreements Act and GSA's interpretation of the definition of a designated country end product and thus was sufficient to constitute a protest. See Imperial Maintenance, Inc., B-224257, Jan. 8, 1987, 87-1 CPD ¶ 34. Under our regulations, 4 C.F.R. § 21.2(a)(3), matters originally protested to the contracting agency are timely if protested to our Office within 10 working days of the protester's actual or constructive notification of initial adverse agency action. Here, initial adverse agency action was GSA's rejection of Tic-La-Dex's offer. Since Tic-La-Dex protested here within ten working days of June 13, the date it received notice of the rejection, we consider the protest timely.

GSA also argues that if the protester's contentions concerning the Trade Agreements Act are correct, the Balance of Payments Program would apply because the items being procured are for use in foreign countries. See FAR §§ 25.300; 25.402(a)(1). GSA argues that since Tic-La-Dex has failed to properly categorize the items offered as domestic or foreign, its offer could not be evaluated for purposes of the Balance of Payments Program, and thus its protest should be dismissed in any event. We disagree. Since the Balance of Payments Program requires that a price differential be added to offers for foreign products, GSA can evaluate Tic-La-Dex's offer in the light least favorable to Tic-La-Dex, that is, as an offer to supply foreign products. We therefore find no basis to dismiss the protest on this ground.

Tic-La-Dex first protests that the Trade Agreements Act does not apply to the present procurement because the $171,000 threshold which must be met before the Act applies has not been met. In this regard, Tic-La-Dex notes that the original solicitation estimated the annual requirements for SIN B75 at $97,635, and the award period as 3 years from December 1, 1987, or date of award, until November 30, 1990. Tic-La-Dex argues that since the earliest date it could have received award was July 1, 1989, its contract at most would be for 17 months (July 1, 1989 to November 30, 1990). As a result, Tic-La-Dex contends, based on the estimated annual value of GSA's requirement for SIN B75 its contract could not be valued at more than $138,316, well below the threshold.

GSA replies that Tic-La-Dex's arguments are based on its assumption that whether the threshold is met is determined

from the period of a particular offeror's potential contract. To the contrary, argues GSA, the value of the contract for determining whether the threshold is met is derived from the estimated value of the SIN for the full period of the IFSS contract. Thus, GSA argues that the original performance period--December 1, 1987 through November 30, 1990, or 3 years--is controlling, not the 17-month period--July 1, 1989 to November 30, 1990--for which the protester could have been awarded a contract as a result of the open season. Accordingly, GSA concludes that based on multiplying the government's estimated annual value of orders to be placed for SIN B75 ($97,635) by the original 3-year contract award period, the estimated value of the contract is $292,907, which exceeds the $171,000 threshold for application of the Trade Agreements Act.

To support its position, GSA points to GSA Federal Acquisition Regulation (GSAR) § 525.402-70(b) which provides,

> "[T]he dollar threshold specified by the U.S. Trade Representative is applicable to the total estimated dollar value of all orders placed under the contracts for eligible products under a Special Item Number during the contract period, not the dollar value of individual products on a purchase/delivery order placed against the schedule contract." (Emphasis added.)

GSA argues that the use of the plural, "contracts," demonstrates that the dollar threshold is determined from all orders expected to be placed under the solicitation and not from any individual contract. To further support its position that the threshold is calculated from the government's total estimated value of the items the government expects to obtain over the life of the IFSS contract, GSA also points to FAR § 25.402(a)(1), which refers to the value of the "proposed acquisition" of an eligible product being greater than the threshold; FAR § 25.402(a)(5), which requires the value of all option periods to be included in calculating the threshold; and FAR § 25.402(d), which prohibits agencies from dividing requirements to reduce the estimated value below the dollar threshold. Finally, GSA asserts that Tic-La-Dex's position would create an unequal situation among offerors because offerors that responded to the open season amendment would be evaluated on a different basis--a shorter contract period, and thus a lower estimated value--than the offerors that responded to the initial solicitation.

Tic-La-Dex counters that the General Agreement on Tariffs and Trade (GATT) Agreement on Government Procurement

(1979),1/ as implemented by the Trade Agreements Act, makes it clear that the threshold for purposes of the Act relates to each individual procurement contract. In this regard, Article I.1(b) provides as follows:

> "This Agreement applies to any procurement contract of a value of SDR (Special Drawing Rights)2/ 150,000 or more. No procurement requirement shall be divided with the intent of reducing the value of the resulting contract below SDR 150,000. If an individual requirement for the procurement of a product of the same type results in the award of more than one contract or in contracts being awarded in separate parts, the value of these recurring contracts in the twelve months subsequent to the initial contract shall be the basis for the application of this agreement."

According to Tic-La-Dex this provision shows that (1) the value of the procurement for determining whether the threshold is met is determined from the offeror's individual contract; and (2) where multiple contracts are awarded the value for determining if the Trade Agreements Act applies is based on the 12 months subsequent to the initial contract award. On this basis, argues Tic-La-Dex, since it will receive a subsequent award under the IFSS solicitation, the value of its contract for purposes of determining whether the threshold is met is $97,635, the estimated annual requirement.

Both Tic-La-Dex and GSA agree that the factor determining whether the threshold has been met is the government's estimated value of the acquisition. The dispute, and the

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1/ We note that effective February 14, 1988, the GATT Agreement on Government Procurement has been modified. The changes do not affect this protest.

2/ The Special Drawing Right is the unit of account of the International monetary fund, and is a weighted average of the value of a group of currencies including the dollar. Until February 14, 1988, the applicable value for application of the Trade Agreements Act was SDR 150,000. See 46 Fed. Reg. 1657, 1658 (1981). After that date, the threshold was changed to SDR 130,000. See 53 Fed. Reg. 3284, 3285 (1988).

issue for resolution, is whether the value of the acquisition is the potential value of an individual offeror's contract, or the estimated value of the entire acquisition based on the government's estimate of its requirements. While we agree with GSA that whether the threshold is met is based on the total estimated dollar value of all orders to be placed during the contract period, we find that the applicable contract period is the 2-year open season, not the original 3-year period.

First, in explaining the procedures to be used in evaluating offers, FAR § 25.405, as it was in effect on April 28, 1988, the date the open season solicitation was issued, referred to "[w]hen the proposed acquisition of an eligible product is estimated to be at or over the thresholds . . . ." In our view, this can only refer to the government's estimate of how much it expects to purchase under a solicitation since it is the government and not any individual offeror that determines the "proposed acquisition" and estimates its requirements. Further, FAR § 25.402(a)(1) provided that "[A]gencies shall evaluate offers at or over the dollar threshold. . . ." Offers are generally submitted in response to the government's estimated requirements as indicated in the solicitation. Thus, in this case, Tic-La-Dex submitted its offer for a potential 2-year contract. The fact that delays in the procurement process reduced the potential time period of this contract to at most 17 months does not change the basis on which the offer was submitted. In addition, FAR § 25.402(d) prohibited agencies from dividing a requirement with the intent of reducing the value of the resulting offer below the dollar threshold. This provision could not have any relationship to an individual offeror's contract, but only to an agency's estimate of its total requirement.

Second, GSAR § 525.402-70(b), as in effect at the time the solicitation was issued, provides that when multiple award schedules are involved the threshold is applicable to the total estimated dollar value of all orders placed under contracts for eligible products. We find it clear that in referring to all contracts placed during the contract period, the GSAR directs that the threshold be determined from the estimated dollar value of all contracts expected to be awarded for the full contract period and not from one offeror's potential contract. Also, we believe that GSA's interpretation is correct because procuring agencies cannot be expected to wait until a contract is awarded to determine if the product offered can be accepted, and thus must decide whether to apply the Trade Agreements Act at the time offers are being evaluated.

Finally, we disagree with Tic-La-Dex that the GATT Agreement on Government Procurement demonstrates that where multiple contracts are involved, whether the threshold is met is determined from each individual contract based on the estimated value of that contract for 12 months. Rather, in our view, the purpose of this provision is to prevent the agencies from awarding multiple contracts to avoid application of the Trade Agreements Act. Thus, we believe the cited provision of the GATT agreement is applicable where separate contracts are awarded to more than one offeror, or, for example, where an initial contract with follow-on contracts is awarded to the same offeror. Under such circumstances the GATT Agreement directs the contracting agency to consider the total value of all contracts awarded or the estimated value of the initial and follow-on contracts in determining if the threshold is met. Our interpretation is supported by the fact that the provision concerning multiple contracts follows a sentence that cautions contracting agencies against splitting procurements to reduce the value of resulting contracts below the threshold.

While we agree with GSA that the threshold is determined from the estimated value of the acquisition, and not from the potential value of an individual offeror's contract, we find that in the present case GSA improperly used $171,000 as the threshold for applicability of the Trade Agreements Act and improperly determined that this threshold had been met by multiplying $97,635, the estimated yearly requirements, by 3 years based on the award period stated in the solicitation that was initially issued in June 1987. Instead, we find that the proper way to determine whether the Trade Agreements Act threshold was met was to treat the open season as a new and separate procurement.

Under the open season amendment issued on April 28, 1988, GSA requested new offers. The notice announcing the open season provided for a potential award period of 2 years, that is from December 1, 1988, or date of award, through November 30, 1990. In our view, GSA should have referred to this 2-year time period to determine whether the threshold had been met. Thus, for purposes of determining if the threshold was met, the value of the contract is $97,635 multiplied by 2 years, or $185,270. Further, for solicitations such as the present one which were issued on or after February 14, 1988, the threshold is $156,000, not $171,000. See 53 Fed. Reg. 3284 (1988). Since the estimated value of the contract was $185,270, the threshold for application of the Trade Agreements Act was met.

In reaching this conclusion, we disagree with GSA that using a time period other than the 3-year contract period estimated in the initial solicitation will create an unequal situation among offerors because those who submitted offers during the open season will be evaluated using a shorter contract period, with a lower estimated contract value, than those offerors that responded to the initial solicitation. Specifically, since the open season offeror will not have an opportunity to supply the office supplies for the first year of the original schedule, we think it is unreasonable to use the estimated requirements for that year to determine if the threshold is met.

Tic-La-Dex next notes that under FAR § 25.403(c), the Trade Agreements Act does not apply to purchases under small or small disadvantaged business preference programs. Tic-La-Dex argues that because the solicitation contains FAR § 14.407-6, entitled "Preference for Small Business Concerns and Labor Surplus Area Concerns," the Trade Agreements Act does not apply to this procurement.

The clause referred to by Tic-La-Dex provides that any contract resulting from the solicitation will contain the following statement: "Where two or more items at the same delivered price will meet the ordering agency's needs equally well, selection should be based on preference for a labor surplus area concern or a small business concern." We disagree that this clause takes the procurement outside the scope of the Trade Agreements Act.

First, the clause is not applicable to the present solicitation. That is, it does not concern whether an offeror such as Tic-La-Dex receives a contract for the IFSS. Rather, it informs offerors under the solicitation that if they receive a contract for the schedule the clause will be inserted in the contract for purposes of determining which schedule contractor receives an order in the event two or more offerors offer similar items at the same price. More importantly, the clause does not establish a preference program for small business concerns such as those established by FAR subpart 19.5 (Set-Asides for Small Business) and FAR subpart 19.8 (Contracting with the Small Business Administration (The 8(a) Program)). Rather, it establishes a procedure by which agencies are to choose among schedule contractors when there are offers at the same price.

Finally, Tic-La-Dex asserts that even if the Trade Agreements Act applies to the present procurement, its offer was improperly rejected because it offered items which qualify as designated country end items.

FAR § 25.401 gives a list of designated countries, p from which are exempt from application of the Trade Agreements Act. It also defines a "designated count product" as:

> "[A]n article that (a) is wholly the growth, product, or manufacture of the designated count or (b) in the case of an article which consists whole or in part of materials from another coun or instrumentality, has been substantially tran formed into a new and different article of commerce with a name, character, or use distinc from that of the article or articles from which was so transformed."

Tic-La-Dex's initial offer indicated that the firm w offering items from either Taiwan or South Africa, n of which is a designated country. In response to a from GSA for further information on the country of o of the products it offered, Tic-La-Dex stated that t items it intended to supply were derived from materi originated in either Taiwan or South Africa but were substantially transformed into different items in th States and thus qualified as designated country end exempt from application of the Trade Agreements Act.

GSA's position is that since the United States is no listed as a designated country under FAR § 25.401, t that the foreign items are transformed in the United does not change them into designated country end ite Relying on FAR § 52.225-9--which defines a "domestic product" as one which is "(a) an unmanufactured end mined or produced in the United States, or (b) an en product manufactured in the United States, if the cost or its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components"--GSA further argues that the items offered by Tic-La-Dex are not domestic items because they are neither manufactured in the United States nor comprised of d components that exceed 50 percent of the cost of all components. GSA maintains that since Tic-La-Dex is offering designated country end products or domestic products, it is offering foreign end products. GSA concludes that since the Trade Agreements Act preclu agencies from accepting offers of foreign items othe designated country end items, Tic-La-Dex's offer was properly rejected.

Tic-La-Dex replies that neither the FAR, the Trade A ments Act, the executive order implementing the Act legislative history of the Act require that the

transformation of an item take place in a designated country. Tic-La-Dex also argues that GSA's interpretation is inconsistent with the intention of the Trade Agreements Act--to encourage reciprocal competitive procurement practices by other countries--because it penalizes United States workers involved in the transformation process. Finally, Tic-La-Dex notes that the definition of domestic end products on which GSA relies is a Buy American Act definition that does not appear in FAR subpart 25.4, which implements the Trade Agreements Act. Tic-La-Dex thus argues that to the extent GSA relies on this definition to exclude products transformed in the United States from being designated country end items, GSA is in error.

First, we find that GSA has reasonably concluded that a foreign product which is substantially transformed into a different item in the United States does not become a designated country end product, exempt from application of the Trade Agreements Act. The intent of the Trade Agreements Act, which deals exclusively with trade with foreign countries, is to encourage reciprocal trade with other countries. We fail to see how, as Tic-La-Dex contends, GSA's interpretation--that to qualify as a designated country end product a foreign item from a non-designated country must be substantially transformed in a designated country and not in the United States--is inconsistent with this intent. Further, since the United States is not listed among the designated countries, it would be inconsistent to say that a product transformed in the United States is a designated country end product. Finally, insofar as Tic-La-Dex argues that the definition of domestic end product used by GSA is inapplicable to the Trade Agreements Act because it is not within the FAR subpart governing the Trade Agreements Act, the fact is that FAR § 52.225-9 uses the definition set forth by GSA for a domestic end product for purposes of the Trade Agreements Act. See Marbex, Inc., B-225799, May 4, 1987, 87-1 CPD ¶ 468.

Nor can the foreign products transformed in the United States be considered domestic products. In this regard, as GSA notes, the definition of a domestic end product for purposes of the Trade Agreements Act is different than the definition of a designated country end product, and an item which falls within the definition of a designated country end product but was transformed in the United States does not meet the criteria for a domestic end product. Given these factors we cannot conclude that GSA improperly rejected Tic-La-Dex's offer for offering foreign country end products.

The protest is denied. Accordingly, Tic-La-Dex is not entitled to recover its protest costs, Space Commerce Corp., B-235429, Aug. 29, 1989, 89-2 CPD ¶ ___.

for James F. Hinchman
General Counsel