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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: TLT-Babcock, Inc.

File: B-244423

Date: September 13, 1991

Nicholas L. Evanchan for the protester.
Darleen A. Druyun and Alexander Barna, Esq., National Aeronautics and Space Administration, for the agency.
Linda C. Glass, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that solicitation improperly contained Buy American and Trade Agreement Acts provisions is untimely under Bid Protest Regulations when filed after bid opening.

2. Where the Trade Agreements Act of 1979 properly applied to the procurement, protester was not entitled to any preference for offering a domestic end product where awardee offered to supply products from Japan, a "designated country" entitled to an equivalent preference.

3. There is no requirement that a procuring agency equalize whatever competitive advantage a foreign firm may have because the firm is not subject to certain solicitation provisions, such as socio-economic requirements, applicable to United States concerns.

DECISION

TLT-Babcock, Inc. protests the award of a contract to Mitsubishi International Corporation (MIC) under invitation for bids (IFB) No. 2-34250 (LJH), issued by the National Aeronautics and Space Administration (NASA) Ames Research Center (ARC) for the fan assembly system for restoration of the 12-foot pressure wind tunnel at ARC, Moffett Field, California. TLT essentially contends that NASA is exempt from including in the IFB the restrictions of the Buy American Act provisions and that the inclusion of these provisions in the solicitation makes it defective. Alternatively, TLT argues that it should be given a preference in accordance with the Buy American Act.

We dismiss the protest.

The IFB was issued on an unrestricted basis on February 28, 1991, and bid opening was May 1. The solicitation contained Federal Acquisition Regulation (FAR) § 52.225-8, "Buy American Act-Trade Agreements Act-Balance of Payments Program Certificate," and incorporated by reference FAR § 52.225-9, "Buy American Act-Trade Agreements Act-Balance of Payment Program." These clauses relate to the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501 et seq. (1988), and its implementing regulations, FAR subpart 25.4. 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."

Three bids were received at bid opening. MIC submitted the low bid and indicated that it intended to supply a product manufactured in Japan. A preaward survey of MIC was conducted, and a visit was also made to MIC's facility in Japan. The contracting officer found MIC to be responsible and, on May 30, award was made to MIC for $4,635,000. TLT filed this protest with our Office on June 11.

As a preliminary matter, TLT protests that NASA failed to suspend contract performance as required by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d)(1) (1988). However, under CICA and our Bid Protest Regulations, a contracting agency is only required to suspend contract performance if it is notified of a protest filed with our Office within 10 calendar days of contract award. 31 U.S.C. § 3553(d)(1); 4 C.F.R. § 21.4(b) (1991). The record shows that TLT's protest was filed with our Office on June 11, 12 calendar days after contract award. Therefore, NASA was not required to suspend performance. While TLT maintains that it provided NASA with oral notification that it was going to file a protest with our Office within 10 calendar days of contract award, there is no requirement to suspend performance in the absence of notification to the agency by our Office of a protest filed with our Office within 10 calendar days of contract award. See id.

As stated above, TLT contends that NASA is exempt from including the restrictions of the Buy American Act provisions in the IFB and that the inclusion of these provisions in the

solicitation made it defective. TLT maintains that the solicitation should be canceled and the requirement resolicited.

Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991), protests against apparent solicitation improprieties must be filed prior to bid opening. The protester's objections to the inclusion of the Buy American Act provisions in the solicitation concern alleged solicitation improprieties apparent from the face of the solicitation and should have been raised prior to bid opening. Because the protester did not raise this issue to either the agency or our Office until after the bid opening date and the award, this ground of protest is dismissed as untimely.

TLT next contends that its bid should be given preference in accordance with the Buy American Act for having its work produced and manufactured in the United States.

Although the Buy American Act, 41 U.S.C. §§ 10a et seq. (1988) was enacted to establish a legal preference for domestic products over foreign products in government procurements, the later-enacted Trade Agreements Act was intended to forgo the preference where a specified group of foreign countries is involved. See FAR § 52.225-9(a); Leland Ltd., Inc., B-224715, Dec. 24, 1986, 86-2 CPD ¶ 713. The Trade Agreement Act, as implemented by FAR § 25.4, provides that when the value of certain government procurements exceed a dollar threshold established by the United States Trade Representative, the provisions of the Trade Agreements Act apply to the procurement and provisions of the earlier-enacted Buy American Act are waived. See 19 U.S.C. § 2511(a); FAR § 25.402(a); Becton Dickinson AcuteCare, B-238942, July 20, 1990, 90-2 CPD ¶ 55. In essence, the Trade Agreements Act puts designated foreign end products on an equal footing with domestic end products for price evaluation purposes. FAR § 25.401(a)(5) lists Japan as a designated country for purposes of the Trade Agreements Act, and the dollar threshold that was in effect at the time of contract award was $172,000. Since the value of the procurement in issue was far in excess of that amount, by law the Buy American Act was waived, and since Japan is a designated country, products from Japan were properly given the same preference as domestic end products. This protest ground is dismissed. 4 C.F.R. § 21.3(m) (1991), as amended by 56 Fed. Reg. 3759 (1991).

TLT next protests the responsibility of MIC to perform the contract and questions MIC's financial capability, lack of manufacturing capability in the United States, and the potential ease at which MIC could avoid NASA claims and

liquidated damages. TLT also argues that NASA will have difficulty enforcing the inspection and quality control clauses of the contract against MIC.

An offeror's ability to meet its contractual obligation is a matter of the firm's responsibility. Prior to awarding MIC the contract, NASA performed a preaward survey and found MIC to be responsible. Our Office will not review protests of affirmative determinations of responsibility absent a showing of possible bad faith or fraud on the part of procuring officials or that definitive responsibility criteria have not been met. 4 C.F.R. § 21.3(m)(5) (1991); Service & Sales, Inc., B-229602, Nov. 25, 1987, 87-2 CPD ¶ 525. Neither exception is present in this case. Whether MIC actually performs in accordance with the requirements of the contract involves a matter of contract administration which this Office does not review under its bid protest function. See 4 C.F.R. § 21.3(m)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). Service & Sales, Inc., supra.

Finally, TLT argues that United States companies have a number of small business and affirmative action laws that must be followed in order to bid on government contracts. 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 TLT) as domestic firms. See Pall Land and Marine Corp. et al., B-223478 et al., July 16, 1986, 86-2 CPD ¶ 77; Pyrotechnics Indus., Inc., B-221886, June 2, 1986, 86-1 CPD ¶ 505. Consequently, foreign firms are under no obligation to comply with these provisions. We dismiss this ground of protest. 4 C.F.R. § 21.3(m) (1991), as amended by 56 Fed. Reg. 3759 (1991).

The protest is dismissed.

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Assistant General Counsel