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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Anderson Columbia Co., Inc.

File: B-249475.3

Date: October 27, 1992

Jeffrey A. Lovitky, Esq., for the protester.
Garrett L. Ressing, Esq., Department of the Navy, for the agency.
Catherine M. Evans, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest allegation that award violates provisions of Buy American Act is dismissed where contract is to be performed outside the United States and therefore is not subject to the Act.

2. Protest that agency improperly included proprietary specification in solicitation, filed after bid opening, is untimely.

3. Protest that awardee may violate contract requirement for use of U.S. flag vessels is dismissed, as it concerns a matter of contract administration outside General Accounting Office bid protest function.

4. General Accounting Office will not consider protest that awardee's labor practices in foreign country violate U.S. policy, since allegation does not concern a violation of procurement laws or regulations.

DECISION

Anderson Columbia Co., Inc. protests award of a contract to Colas Road Contractors under invitation for bids (IFB) No. N62470-92-B-2229, issued by the Naval Facilities Engineering Command for repairs to the runway at the U.S. Naval Air Station (NAS), Guantanamo Bay, Cuba.

Colas was the apparent low bidder at the July 21, 1992, bid opening; Anderson was second low. The next day, Anderson filed a protest with the contracting officer against the possibility of an award to Colas. Anderson's protest essentially argued that U.S. tax dollars should be spent on U.S. businesses in order to support the U.S. economy. The

contracting officer denied Anderson's protest on September 14, stating that the Buy American Act does not apply to construction contracts to be performed outside the U.S. Anderson then filed this protest on September 24.

Anderson alleges that award to Colas was improper for a number of reasons: (1) the award to Colas violates the terms of the Balance of Payments Program; (2) the Navy's intended use of funds from its operations and maintenance (O&M) account violates the Anti-Deficiency Act; (3) the award to Colas violates the terms of the Buy American Act; (4) the Navy failed to prepare a proper justification for specifying particular manufacturers' products in the solicitation; (5) Colas may violate its contractual requirement to utilize U.S. flag ships during performance; and (6) Colas' use of low-paid foreign labor and brokered labor in performance of a U.S. contract violates U.S. policy and the Copeland Act.

As discussed below, we summarily dismiss all but the first two allegations.

BUY AMERICAN ACT

Anderson alleges that the Navy improperly failed to disqualify Colas, a Danish firm, from receiving the award under the terms of the Buy American Act, 41 U.S.C. §§ 10a-10c (1988). This protest ground is without a legal basis. The Buy American Act does not apply to work to be performed outside the United States. 41 U.S.C. § 10a; Federal Acquisition Regulation (FAR) § 25.202. Since the contract here is to be performed in Cuba, it is not subject to the provisions of the Buy American Act.[1]

SPECIFICATION OF PARTICULAR MANUFACTURERS' PRODUCTS

Anderson contends that the Navy improperly specified two proprietary products in the IFB without making the justifications required by FAR § 6.303-1 or obtaining the authorizations required by FAR § 6.304. This protest ground is untimely. Under our Regulations, protests of alleged improprieties in an IFB must be filed before bid opening. 4 C.F.R. § 21.2(a)(1) (1992). If Anderson believed the Navy did not have the authority to include proprietary

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[1]Anderson appears to be arguing that NAS Guantanamo Bay is within the United States for purposes of the Buy American Act because it is under the control of the United States. Under this reasoning, however, every U.S. military installation located in a foreign country would be considered a part of the United States for purposes of applying the Act; obviously, this is not the case.

specifications in the IFB, it should have raised the matter before bid opening. We therefore will not consider the argument. (We note, however, that the Navy furnished us with copies of the required justifications and approvals in connection with another protest that was filed against this procurement; the documents appear to meet the FAR requirements.)

USE OF U.S. FLAG VESSELS

Anderson asserts that Colas has failed to utilize U.S. flag vessels in its performance of other contracts at Guantanamo Bay, and may continue to use foreign flag vessels in performing this contract contrary to the terms of the IFB. We will not consider this protest ground. Whether Colas ultimately performs the contract in accordance with the solicitation requirements is a matter of contract administration outside the scope of our bid protest function. 4 C.F.R. § 21.3(m)(1). To the extent that Anderson may be challenging the contracting officer's failure to consider Colas' ability or intent to perform the contract using U.S. flag vessels, this is a matter of Colas' responsibility, the affirmative determination of which we also will not review absent circumstances not present here. 4 C.F.R. § 21.3(m)(5).

COMPLIANCE WITH LABOR POLICIES AND COPELAND ACT

Anderson alleges that Colas currently is using foreign labor at low wage rates, and expresses concern that the Navy's acceptance of the practice under this contract "raises serious policy issues pertaining to the conduct of U.S. public works." Anderson has not stated a legally sufficient protest basis. As Anderson apparently recognizes, U.S. labor laws do not apply to this contract; thus, those laws provide no legal basis for objecting to the Navy's acceptance of Colas' labor practices. In any case, even if labor laws did apply to this contract, Colas' compliance with them would be a matter of contract administration that, as indicated above, we will not consider. 4 C.F.R. § 21.3(m)(1).

Finally, Anderson asserts that foreign laborers at Guantanamo may be forced to submit portions of their wages to labor brokers in violation of the Copeland Act; Anderson contends that the Navy improperly failed to include the Copeland Act provision at FAR § 52.222-10 in this contract. This protest ground is untimely; Anderson should have challenged the Navy's failure to include the Copeland Act provision in the IFB before bid opening. 4 C.F.R. § 21.2(a)(1). Timeliness notwithstanding, we note that the Copeland Act is inapplicable to this contract, as the contract is to be performed outside the United States and

therefore is not subject to federal wage standards. See FAR § 22.407(a); 29 C.F.R. § 3.1 (1992).

The protest grounds discussed above are dismissed. Anderson's remaining protest grounds regarding the agency's failure to evaluate bids in accordance with the Balance of Payments Program and its alleged violation of the Anti-Deficiency Act will be the subject of a future decision on the merits.

Ronald Berger
Associate General Counsel