Gorczycki 149444

Comptroller General
of the United States

Washington, D.C. 20548

112945

Decision

Matter of: E.D.I., Inc.

File: B-251750; B-252128

Date: May 4, 1993

Edi E. Birsan for the protester.
Eric J. Nestor, Esq., Alan W. Mendelsohn, Esq., and Richard S. Haynes, Esq., Department of the Navy, for the agency.
Henry J. Gorczycki, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that Trade Agreements Act is not applicable to a solicitation for freight containers is untimely under the Bid Protest Regulations, where the protest is filed after the closing date for receipt of proposals and the solicitation announces the applicability of the Act.

2. Where an agency has no information prior to award which casts doubt on representations made by awardees on their certifications that the end products offered are in accordance with the Trade Agreements Act, the agency may properly rely on the awardees' representations without further investigation; whether the awardees actually supply end products in compliance with the Trade Agreement Act concerns a matter of contract administration not subject to review by the General Accounting Office.

DECISION

E.D.I., Inc. (EDI) protests various awards under requests for proposals (RFP) Nos. N00033-93-R-3012, N00033-93-R-3015, N00033-93-R-3016, N00033-93-R-3020 and N00033-93-R-3021 issued by the Department of the Navy, Military Sealift Command (MSC), for the lease of freight containers. EDI also protests the award for the purchase of freight containers under RFP No. N00033-92-R-3053.

We dismiss the protests.

MSC issued RFP No. N00033-92-R-3053 on October 19, 1992, contemplating the award(s) of a firm, fixed-price contract(s) for the purchase of new or used freight containers. Award was to be made on the basis of initial offerors without discussions to the lowest priced, technically acceptable, responsible offeror. MSC received numerous

proposals, including EDI's, by the December 4 closing date for receipt of proposals.

MSC issued the remaining RFPs for the lease of the freight containers during December 1992, contemplating the awards of firm, fixed-price contracts. The leased containers were for the emergency humanitarian operations in Somalia under Operation Restore Hope. Award was to be made on the basis of initial offers without discussions to the lowest priced, technically acceptable, responsible offeror. MSC received numerous proposals, including EDI's, in response to the RFPs.

All of the RFPs stated that they were subject to the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2582 (1988).[1] The Trade Agreements Act authorizes the President to waive all buy-national laws, regulations or procedures for the acquisition of eligible products from any country designated as a reciprocating, signatory nation to a recognized agreement or as a least developed country. 19 U.S.C. § 2511; Hung Myung (USA) Ltd., Inc.; Containertechnik Hamburg GmbH & Co., 71 Comp. Gen. 64 (1991), 91-2 CPD ¶ 434; Olympic Container Corp., B-250403, Jan. 29, 1993, 93-1 CPD ¶ 89. The net effect of the Act is that end products of designated countries, Caribbean Basin countries or qualifying countries receive the same treatment as domestic products in procurements subject to the Act.[2] Olympic Container Corp., supra. The Act and the Department of Defense's implementing regulations also provide that "in order to encourage additional countries to become parties to the Agreement and to provide appropriate reciprocal competitive government procurement opportunities to U.S. products and suppliers of such products," the procurement of end products subject to the Act that are manufactured or produced in non-designated, non-qualifying or non-Caribbean Basin countries, is

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[1]Procurements of freight containers are subject to the Trade Agreements Act. Defense Federal Acquisition Regulations Supplement (DFARS) § 225.403-70 (Federal supply group 81 "Containers, Packaging and Packing Supplies").

[2]The list of designated countries under the Act appears at Federal Acquisition Regulation (FAR) § 25.401 (FAC 90-14). Qualifying countries are listed in Defense Federal Acquisition Regulations (DFARS) § 225.872-1--qualifying countries are those with which there are memoranda of understanding or other international agreements pertaining to the acquisition of defense equipment; the end products of qualifying countries are essentially treated the same as designated countries for defense equipment products to which the Trade Agreements Act applies. DFARS § 225.402(c)(i).

prohibited.[3] 19 U.S.C. § 2512(a); FAR § 25.402(c); DFARS § 225.402(c)(1); Hung Myung (USA) Ltd., Inc.; Containertechnik Hamburg GmbH & Co., supra; Olympic Container Corp., supra. To implement the Trade Agreements Act, offerors were required by the purchase and lease RFPs to identify and certify the countries of origin of the proposed end products.

With regard to the lease RFPs, several offerors, including EDI, certified or represented that the end products proposed were from countries that were neither qualifying, designated nor Caribbean Basin.[4] All of these offers of noncompliant products were rejected. During December, MSC awarded the lease contracts and informed EDI that its proposals had been rejected because they were not eligible for award under the Trade Agreements Act. EDI states that it then informed MSC that all of the offerors on the lease RFPs draw freight containers from the same freight yard, which allegedly consists primarily of containers of non-designated, non-Caribbean Basin or non-qualifying countries, and claimed that all of the offerors who had certified that they would provide eligible end products had submitted false certifications and would supply end products of non-designated, non-Caribbean Basin or non-qualifying countries. EDI protested the lease RFP awards to our Office on December 22, asserting that it submitted the only truthful certification on the lease RFPs and that MSC should have considered its offer on an equal basis with all other proposals since there were no domestic sources for the leased containers.

With regard to the purchase RFP, MSC rejected EDI's offer of an end product of the Commonwealth of Independent States (the former Soviet Union)--which is not a designated, Caribbean Basin, or a qualifying country. On January 12, 1993, MSC awarded a contract under the purchase RFP to Colakoglu Dis Ticaret, which certified that its end products were from Turkey, a qualifying country. On January 28, EDI protested in our Office, asserting that the Trade Agreements Act does not prohibit award to an offeror proposing end products from non-designated or non-qualifying countries.

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[3]While there is provision for waiver the Trade Agreements Act, 19 U.S.C. § 2512(b), there was no basis for granting the waivers for these procurements since the agency's requirements could be satisfied within the constraints of the Act. See Hung Myung (USA) Ltd., Inc.; Containertechnik Hamburg GmbH & Co., supra.

[4]EDI certified that the end products which it had offered for lease were from various non-designated, non-Caribbean Basin, or non-qualifying countries, specifically stating, "Russia, Poland, Korea, Taiwan, etc."

Inasmuch as EDI's proposals offered the end products of non-designated, non-Caribbean Basin, and non-qualifying countries, MSC properly found EDI's proposals ineligible for award and excluded them from the evaluation process. 19 U.S.C. § 2512(a); FAR § 25.402(c); DFARS § 225.402(c)(i); Hung Myung (USA) Ltd., Inc.; Containertechnik Hamburg GmbH & Co., supra; Olympic Container Corp., supra.

EDI essentially contends that the Trade Agreements Act should not apply to the protested RFPs. We dismiss EDI's contentions in this regard as untimely under our Bid Protest Regulations, inasmuch as the RFPs expressly advised offerors of MSC's intent to apply the Act and since EDI's protests were filed after the due date for receipt of initial proposals.[5] 4 C.F.R. § 21.2(a)(1) (1993); Hung Myung (USA) Ltd., Inc.; Containertechnik Hamburg GmbH & Co., supra.

EDI also asserts that the awardees under the lease RFPs submitted false certifications and were actually going to provide containers manufactured in non-designated or non-qualifying countries, and that EDI was unfairly penalized for being truthful. MSC responds that it properly relied on contractors' certifications to make award and argues that the issue of an awardee's compliance with its certifications involves a matter of contract administration not for review by our Office. We agree with MSC and dismiss these protest contentions.

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[5]In any case, EDI's arguments as to the nonapplicability of the Trade Agreements Act lack merit. For example, EDI suggests that under the language of FAR Subpart 25.4, the Trade Agreements Act may apply only to purchases and not leases; however, FAR § 25.402(c) states that "there shall be no acquisition of foreign end products subject to the Act unless the foreign end products are designated country end products" (emphasis added), and FAR § 2.101 defines "acquisition" as "the acquiring by contract . . . of supplies or services . . . through purchase or lease." (Emphasis added.)

EDI also alleges that the Trade Agreements Act should only apply where there are domestic products proposed. However, nothing in the Act nor any implementing regulation suggests this interpretation--which is inconsistent with the purpose of the Trade Agreements Act to encourage non-designated countries to become parties to an agreement with the United States by treating those countries' end products the same as domestic products and by excluding the end products of non-designated countries until such time as they become parties to an agreement. Olympic Container Corp., supra.

A successful bidder or offeror represents and certifies in its bid or offer whether it will furnish end products that are eligible under the Trade Agreements Act. When a bidder or offeror represents that it will furnish end products of designated or qualifying countries, it is obligated under the contract to comply with that representation. If prior to award an agency has reason to believe that a firm will not provide compliant products, the agency should go beyond a firm's representation of compliance with the Trade Agreements Act; however, where the contracting officer has no information prior to award which would lead to such a conclusion, the contracting officer may properly rely upon an offeror's representation without further investigation. See Oliver Prods. Co., B-245672, Jan. 7, 1992, 92-1 CPD ¶ 33 (Buy American Act certification); General Sales Agency, B-247529.2, Aug. 6, 1992, 92-2 CPD ¶ 80 (contingent fee representation similar to end product certification); cf. Manufacturing Tech. Assocs. Inc., B-251759, Apr. 5, 1993, 93-1 CPD ¶ ___ (with regard to a bidder's certification of compliance with the restriction on the acquisition of foreign machine tools, an agency's investigation into the country of origin of product offered in response to a protester's pre-award complaint satisfied an agency's duty of inquiry).

Here, EDI's protest of the lease awards was filed after the awards had been made and there is nothing in the record that suggests that MSC had any reason to doubt the awardees' certifications of compliance with the Trade Agreements Act when it made the awards. Since MSC could reasonably rely on the certifications, EDI's challenge of the certifications submitted by the contractors concerns a matter of contract administration between the awardees and MSC for resolution pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-13 (1988), which is not subject to review by our Office.[6] 4 C.F.R. § 21.3(m)(1); Specialty Plastics Prods., Inc., B-237545, Feb. 26, 1990, 90-1 CPD ¶ 228.

[6]As a result of EDI's protest, MSC investigated compliance with the end product certifications of the contractors receiving the lease awards and found that while many contractors were supplying end products compliant with the Trade Agreements Act, several contractors did supply containers manufactured in non-qualifying, non-Caribbean Basin, or non-designated countries in violation of the Act. MSC took action to address these instances of noncompliance by stopping payment and reducing the contract prices. MSC states that it could not terminate the contracts for default due to the urgency of the procurements to support Operation Project Hope.

With regard to the purchase RFP, which EDI also protested after award was made, MSC also relied on the certification of Colakoglu and did not investigate that representation prior to award. While it could be argued that MSC had a duty to inquire beyond the contractor's self-certification, in view of the results of its just completed investigations that indicated that some contractors had erroneously certified compliance with the Trade Agreements Act on the lease RFPs, see footnote 6, infra, the record shows that Colakoglu was a qualifying country manufacturer proposing its own products, which is a different situation from the contracts for leased containers where the supplier is not the manufacturer of the containers. Under the circumstances, we think that MSC could reasonably rely on Colakoglu's representation and thus that firm's actual compliance with the contract requirements also involves a nonreviewable matter of contract administration.[7]

The protests are dismissed.

James A. Spangenberg
Assistant General Counsel

[7]In response to EDI's protest, MSC confirmed that the containers were being manufactured in Turkey, a qualifying country, as Colakoglu had stated in its certification.