

DOCUMENT RESUME

02060 - [A1112093]

[Allegations of Failure to Meet Solicitation Requirements and Source Origin Requirements]. B-186895. April 15, 1977. 7 pp.

Decision re: McKenna Surgical Supply, Inc.; by Robert F. Keller, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).

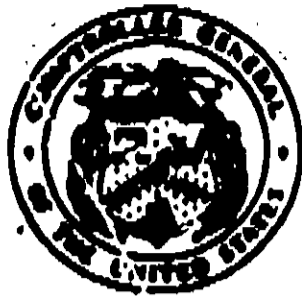
Organization Concerned: American Medical Instrument Corp.; Agency for International Development; General Services Administration.

Authority: Foreign Assistance Act of 1961, as amended, sec. 604 (22 U.S.C. 2354). Buy American Act (41 U.S.C. 10 (a) (e)). AID Regulation 1, subpart E, sec. 201.11. E-186476 (1976). B-194850 (1972). B-174184 (1972). B-174281 (1971). B-181852 (1974). 50 Comp. Gen. 193. 50 Comp. Gen. 201. 54 Comp. Gen. 593. 50 Comp. Gen. 697.

A protest to a contract award for medical and surgical supplies was based on allegations that solicitation requirements were not met and that some items were from a foreign source. Because of improper acceptance of items by the contracting officer and disregard of solicitation requirements, it was recommended that the contract be terminated. Allegations of failure to meet source requirements were incorrect, and restitution was accepted for items from the foreign source.
(HTW)

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DECISION



Bruce Cherkis
Proc. I
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-186895

DATE: April 15, 1977

MATTER OF: McKenna Surgical Supply, Inc.

DIGEST:

1. Allegation that low offeror did not conform to purchase description used in solicitation by offering disposable rubber gloves is correct. Contracting officer acted improperly by accepting blanket assurance that low offeror's equal items were, in fact, equal to brands specified since such an offer to conform does not satisfy descriptive literature requirement of brand name or equal clause.
2. Notwithstanding fact that low offeror took no exceptions to specifications, contracting officer improperly allowed change of supplier of surgical blades from Medical Sterile Products to Bard-Parker since she was on notice of possible problem with this item since low offeror raised question during negotiations. Contracting officer disregarded descriptive literature requirement and should have known Medical Sterile Products does not manufacture carbon steel blades. Such substitution is beyond contemplation of solicitation requirements and is contrary to negotiated procurement procedures. Therefore, recommendation is made that contract be terminated for the convenience of the Government and that outstanding medical kits either undelivered or unordered be resolicited.
3. Allegation that low offeror did not meet source origin requirements of Agency for International Development Regulation No. 1, subpart B, section 201.11, which is virtually identical to "Buy American Act," 41 U. S. C. § 10(a)-(e), is incorrect. While true that AMICO substituted domestic supplier for one submitted in offer, cost of components did not exceed 50 percent of cost of components of designated source country. Where offeror excludes no end products from Buy American certificate and does not indicate it is offering anything other than domestic end products, acceptance of offer will result

in obligation on part of offeror to furnish domestic end products, and compliance with obligation is matter of contract administration which has no effect on validity of contract award.

4. Allegation that items Nos. 52 and 53 were foreign source items rather than domestic as offered proved correct but GSA has accepted AMICO's explanation that items were commingled with those of another contract and has received restitution for difference between foreign items and those offered in solicitation.

McKenna Surgical Supply, Inc. (McKenna), protests against the award of a contract to American Medical Instrument Corporation (AMICO) under solicitation no. FPZ-Z-TC-184-N-6-14-76, issued by the Federal Supply Service, General Services Administration (GSA), on behalf of the Agency for International Development (AID).

The solicitation, issued on May 20, 1976, was for medical kits and surgical instruments necessary for AID's voluntary contraception program. The solicitation provided a "brand name or equal" purchase description for 56 separate items to be combined into six different medical kits designed for the AID program. The date for receipt of initial proposals was June 14, 1976.

As an AID-financed transaction, this procurement was subject to the source origin requirements in AID Regulation No. 1, subpart B, section 201.11, which implements section 604 of the Foreign Assistance Act of 1961, as amended, 22 U. S. C. § 2354 (1970). This AID regulation was incorporated into the solicitation by article 14 of GSA standard form 1246. That portion of the regulation pertinent to the procurement specifies that the source of any commodity supplied under the contract must be a country authorized in the solicitation. In regard to commodities comprised of components, the regulation provides that the cost of components originating in a country other than the designated source country must not exceed 50 percent of the cost of all components. The source origin requirements, including the component provision are virtually identical to the requirements of the "Buy American Act," 41 U. S. C. § 10(a)(e) (1970), and therefore will be applied here as though the "Buy American Act" does apply.

On June 25, 1976, the contract was awarded to AMICO, the lowest acceptable offeror. McKenna was advised of the award on June 28, 1976, and on July 7, 1976, filed its protest in our Office. McKenna contends that AMICO's offer materially differed with the solicitation's

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requirements. Specifically, McKenna argues that AMICO's offer deviated from the solicitation's requirements with respect to item No. 22 (reusable surgeon's gloves) by offering to supply disposable surgeon's gloves, item No. 48 (carbon steel surgical blades) by offering to supply stainless steel surgical blades, and items Nos. 27, 28 and 47 (surgical needles) by incorrectly listing these as domestic source items and, therefore, AMICO's offer did not comply with the 50 percent source origin requirement. On page 12 of the solicitation, it was stated that:

"BIDDERS OFFERING OTHER THAN BRAND NAME ITEMS IDENTIFIED HEREIN SHOULD FURNISH WITH THEIR OFFERS ADEQUATE INFORMATION TO ASSURE THAT DETERMINATION CAN BE MADE AS TO EQUALITY OF THE PRODUCT(S) OFFERED (SEE CLAUSE 74 OF GSA FORM 1246)."

The items being questioned by McKenna were all offered as equal items; however, no descriptive literature was submitted to assure that these items were, in fact, equal.

Item No. 22 of the solicitation required a unit price for:

"22 Gloves, surgeon's reusable latex, Bard-Parker Catalog No. 2041, 2043, or equal. (Pairs of one dozen)."

McKenna maintains that AMICO's offer materially deviated from the above purchase description based on a letter from AMICO's supplier stating that it planned to furnish AMICO a disposable rather than a reusable glove.

Prior to the closing date, AMICO indicated to the contracting officer that the glove supplied by Bard-Parker was no longer available and requested the name of a substitute supplier. The contracting officer informed AMICO that gloves manufactured by the Perry Rubber Company (Perry) were being supplied under a then existing contract pursuant to an identical purchase description. In addition, the contracting officer furnished AMICO the catalogue number (1040) of the Perry glove which the prior contractor, McKenna, had used to identify the glove. AMICO subsequently offered the Perry glove for item No. 22 designated by catalogue No. 1040.

Prior to the award of the contract, the contracting officer sought a formal assurance from AMICO that any item offered as a substitute for a brand name item would be an equal item. By mailgram dated June 24, 1975, AMICO stated:

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"We certify that the cost of foreign items quoted does not exceed 50 percent of the cost of the total items per kit. We further certify that those items offered other than the brand specified are in fact equal to the brands specified."

Based upon this certification and the information furnished regarding item No. 22, which corresponded to that furnished in the prior contract, the contracting officer determined that AMICO's offer for item No. 22 complied with the purchase description in the solicitation.

After the contract was awarded, it was discovered that the number "1040" does not indicate whether a glove is disposable or reusable but refers to the type of packaging. It was also discovered that due to a misunderstanding between AMICO and Perry, Perry intended to supply disposable gloves. When AMICO requested a price from Perry, it cited the surgical procedures for which the glove would be used. Perry mistakenly assumed these procedures required a disposable glove. Perry does manufacture a reusable glove but refused to sell these gloves directly to AMICO. By mailgram dated June 30, 1976, AMICO changed its supplier of reusable gloves to the Pioneer Rubber Company.

It is our view that the contracting officer acted improperly by accepting item No. 22 in light of AMICO's certification of June 24 that the item was equal to the brand name specified in the solicitation. We do not believe that a mere promise to conform, such as AMICO's certification, satisfies the descriptive literature requirement of the brand name or equal clause. See 50 Comp. Gen. 193, 201 (1970). It is well settled that an offer of blanket compliance with the salient characteristics listed in a solicitation is not an acceptable substitute for required descriptive data on an equal product. See Ocean Applied Research Corporation, B-186476, November 9, 1976, 76-2 CPD 393.

McKenna contends that AMICO's offer deviated from the specifications for item No. 48, which stated:

"48. Blades, surgical, carbon steel, size #15, sterile regular pack (6 blades to a package). V. Mueller Catalog No. SU-1415CS, or equal."

In this connection, McKenna asserts that AMICO actually offered stainless steel blades rather than blades made of carbon steel.

Prior to submitting its offer, AMICO inquired whether stainless steel blades could be furnished in lieu of carbon steel blades. It was

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advised that AID had prescribed a carbon steel blade for the medical kits. The contracting officer advised AMICO that if a blade of other than carbon steel was to be offered, the offer must clearly state so in a labeled exception; otherwise, the offer would be considered as an offer to supply the designated type of blade. AMICO submitted an offer which contained no exception or condition to the carbon steel blade requirement.

AMICO listed in its offer the firm of Medical Sterile Products to supply a carbon steel blade for item No. 48. We have been informed that most of the medical instrument industry presently supplies a stainless steel surgical blade rather than a carbon steel blade and Medical Sterile Products, although at one time a supplier of carbon steel blades, apparently is able to deliver only a stainless steel blade. GSA argues that in the absence of a labeled exception AMICO is bound to deliver carbon steel blades. In a letter dated August 4, 1976, AMICO recognized this and indicated it would supply a Bard-Parker carbon steel blade.

Notwithstanding the fact that AMICO took no exceptions and is bound to deliver carbon steel blades, the contracting officer improperly allowed AMICO to change its supplier after award. The contracting officer disregarded the underscored language on page 12. Clearly, she was on notice about a possible problem with this item since AMICO had raised a question about it during negotiations. Had the descriptive literature been supplied as required by the solicitation the contracting officer would have known that Medical Sterile Products does not manufacture carbon steel blades and could have requested AMICO to submit another supplier before an award was made. While Bard-Parker ostensibly would have been acceptable had it been offered before award, it is nevertheless a different offer than the one submitted by AMICO at the time of award. It is our view that such a substitution is beyond the contemplation of the solicitation requirements and is contrary to the procedures of negotiated procurements. Cf. 54 Comp. Gen. 593 (1973).

Finally, McKenna alleges that AMICO did not meet the domestic origin requirements of AID Regulation No. 1, subpart B, section 201.11, for items Nos. 27, 28 and 47. These items were described as follows:

"27. Needle, Keith abdominal, triangular point, straight, 2-1/2". V. Mueller Catalog No. SN-30 or equal. (6 needles to a package; 12 needles = 1 dozen).

"28. Needles, Mayo 1/2 circle, taper point, regular eye, Size 6. Miltex Catalog No. MS-112, or equal. (6 per package).

* * * * *

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"47. Regular surgeon's needles. Cutting edge 1/2 circle, Size 2, stainless steel. (6 needles per packet, 12 needles = 1 dozen. V. Mueller Catalog No. SN-15, or equal."

AMICO's offer for these needle types listed Berbecker as the supplier. AMICO indicated that Berbecker was a domestic manufacturer; however, the Berbecker plant was located in England.

Although Berbecker was mistakenly listed as a domestic source, GSA is of the view that AMICO fully intended to furnish a domestic source medical kit. During negotiations, the contracting officer contacted AMICO to advise that the cost of foreign components listed in its offer appeared to exceed the maximum permitted by the AID regulation. AMICO responded by offering to substitute domestic components to bring its offer in conformance with the source origin requirements. These revisions were confirmed by AMICO in a letter dated June 17, 1976, and they pertained to items Nos. 14, 23, 28, 35, 40 and 45. Furthermore, AMICO stated on June 24, 1976, that the cost of foreign items does not exceed 50 percent of the cost of the total items per kit and therefore was in conformance with the source origin requirements of the applicable AID regulations. By letter dated July 2, 1976, AMICO changed suppliers of the needles to Hospital Marketing Services, a domestic supplier.

Even if AMICO had not been permitted to substitute a domestic supplier for Berbecker, the cost of the components of the kits using items Nos. 27, 28 and 47 still did not exceed 50 percent of the cost of the components of the designated source country.

Our Office has consistently held that where a bidder or offeror excludes no end products from the Buy American certificate in its bid or offer and does not indicate that it is offering anything other than domestic end products, the acceptance of the offer, if otherwise acceptable, will result in an obligation on the part of the bidder or offeror to furnish domestic end products, and compliance with that obligation is a matter of contract administration which has no effect on the validity of the contract award. 50 Comp. Gen. 697 (1971); B-174281, December 17, 1971; B-174184, May 24, 1972; B-174850, April 6, 1972; Unicare Vehicle Wash, Inc., B-181852, December 3, 1974, 74-2 CPD 304. Accordingly, it is our view that the contention raised by McKenna concerning AMICO's compliance with the source origin requirements does not affect the validity of the award to AMICO.

On February 24, 1977, we were advised by McKenna that it was its belief that items Nos. 52 and 53 supplied by AMICO were foreign items rather than domestic as offered. We informed GSA of this advice

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and both GSA and our Office made an onsite investigation. On the basis of the information obtained, we have concluded that McKenna was correct in its belief.

GSA requested an explanation as to why these items did not meet the source origin as indicated by AMICO in its offer. In a letter dated March 8, 1977, AMICO takes the position that it inadvertently commingled foreign source components from medical kits under a similar concurrent contract with the World Health Organization with the domestic components from the GSA contract. AMICO states that to the best of its knowledge only 260 of these items have been affected and it is willing to make restitution to GSA in the amount of \$1,424.52, which represents the difference between the foreign component which was supplied and the domestic item in AMICO's offer. GSA has accepted AMICO's offer of restitution.

In view of the noted deficiencies and irregularities the protest is sustained and we are recommending that the contract with AMICO be terminated for the convenience of the Government and that any outstanding kits, either undelivered or unordered, be resolicited.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letter of today to the congressional committee named in section 236 of the Legislative Reorganization Act of 1970, 31 U. S. C. § 1176 (1970), which requires the submission of written statements by the agency to the House Committee on Government Operations, Senate Committee on Governmental Affairs and Committees on Appropriations concerning the action taken with respect to our recommendation.

Acting

Arthur
Comptroller General
of the United States