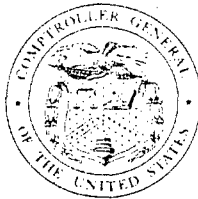


DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

10,769

FILE: B-193083

DATE: July 17, 1979

MATTER OF: Keuffel & Esser Company *CNG 00931*

[Protest Against Army Waiver of Buy American Act]

DIGEST:

1. Army discretionary determination that application of Buy American Act is not in the public interest is not reviewable by GAO.
2. Memorandum of Understanding between United States and Switzerland constitutes basis for waiver of Buy American Act.

Keuffel & Esser Company (K&E) protests the award to Wild Heerbrugg, a Swiss firm, of a contract to supply 100 theodolites under Invitation for Bids (IFB) No. DAAK01-78-B-1447, issued by the U.S. Army Troop Support and Aviation Materiel Readiness Command, St. Louis, Missouri (Army).

Wild Heerbrugg is the low bidder if preference is not given to domestic bids under the Buy American Act (41 U.S.C. 10a-d (1976)) and K&E is the low bidder with the application of the Buy American evaluation criteria. K&E essentially contends that the Army has no authority to award the contract on the basis of a waiver of the Buy American Act. ✓)

A Memorandum of Understanding (MOU) between the United States and Switzerland provides that in order to offset substantial purchases by the Swiss Government from U.S. sources, the Department of Defense (DOD) will attempt to place contracts on a competitive basis with Swiss industries. In this connection, the MOU states:

"If * * * Swiss industry offers items which can meet valid U.S. defense procurement on a competitive basis, * * * [t]he DOD * * * will * * * provide for waiver to the extent permitted under 'Buy National' legislation and regulations."

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The record shows that the Army submitted Wild Heerbrugg's low bid to the Office of the Assistant Secretary of the Army (Research, Development and Acquisition) for the determination whether it would be in the public interest to waive the restrictions of the Buy American Act. A waiver was granted based on the Assistant Secretary's determination that rejection of the Swiss concern's low bid would be inconsistent with the public interest. Consequently, the Army awarded the contract to Wild Heerbrugg.

The Buy American Act at 41 U.S.C. § 10a states that " * * * unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest * * *," articles acquired for public use shall have been mined, produced, and manufactured in the United States.

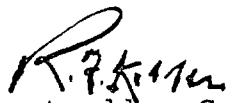
K&E argues that waiver of the application of the Buy American Act is not in the public interest. K&E asserts that the waiver ignores the Government policy to alleviate balance of trade deficit problems, the policy to alleviate chronic unemployment problems particularly in labor surplus areas, and the policy of seeking maintenance of domestic suppliers of critical defense items.

Under the Buy American Act the determination of whether a particular purchase from a domestic source is inconsistent with the public interest is a matter of discretion vested in the head of the department or agency concerned. This decision, which often requires the balancing of conflicting policies, is not subject to review by ^{our} Office. Brown Boveri Corporation, 56 Comp. Gen. 596 (1977), 77-1 CPD 328; Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181; 41 Comp. Gen. 70, 73 (1961). Therefore, we do not question the Army's discretion in determining that the Buy American Act should not be applied to this procurement.

K&E additionally asserts that the Secretary of Defense had no authority to enter into the MOU, and that any offset amount provided for in the MOU has been exceeded prior to the bid opening date. In this connection, the record shows that the Secretary of Defense

properly concluded the MOU with the approval of the Secretary of State. In addition, subsequent to K&E's assertion regarding the limits of the offset amount, the Army provided the protester and this Office with the most recent computation of the offset data, which indicates that the offset objective has not been exceeded. We believe that the MOU between the United States and Switzerland constitutes a valid basis for waiving the Buy American Act.

The protest therefore is denied.


Deputy Comptroller General
of the United States