13105 PL-F

**DECISION**

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

**FILE:** B-195935 **DATE:** March 13, 1980

**MATTER OF:** Self-Powered Lighting, Ltd. DLG-04106 & DLG-04107 AGC00548 AGC00840

**DIGEST:**

1. Although GAO suspended action on protest when protester filed suit in United States District Court raising substantially same issues, protest will be considered where court by endorsement has expressed interest in GAO decision.

2. Determination to conduct negotiated rather than advertised procurement for rifle sights containing tritium, a nuclear by-product, was reasonable where based on procurement history of similar promethium-based item and expectation that licensing requirements would restrict competition.

3. Initial proposal which does not comply with Government-furnished equipment requirement in request for proposals and which incorporates engineering change proposal offering flat rather than spherical-ended tritium beads on rifle sight may not be rejected as non-responsive. The rigid rules of bid responsiveness in advertised procurements do not apply to negotiated procurements.

4. Inclusion of initial proposal in competitive range was reasonable where major defect, failure to include written permission for use of Government-furnished equipment, is easily cured through discussions and engineering change proposal submitted as part of proposal is still under consideration.

5. Request for second round of best and final offers was proper where offeror was not advised of deficiency in proposal which

111786 ~~008952~~

[Protest Against Contract Award]

rendered offeror ineligible for award. Also, accepted engineering change proposal was provided to all offerors to equalize competition.

6. Exemption from Buy American Act differentials of offer by United Kingdom firm to provide rifle sights for domestic use by Army was proper under terms of Memorandum of Understanding (MOU) between United States and United Kingdom. Secretarial Determination and Findings implementing MOU exempts all United Kingdom produced or manufactured defense equipment other than items excluded from MOU. Nothing in MOU excludes rifle sights.

7. Blanket exemption from Buy American Act is authorized by Determination and Finding of Secretary of Defense which applies to all items of United Kingdom produced defense materials under congressional direction to Secretary to implement "to the maximum feasible extent" policy of NATO standardization and interoperability. Furthermore, Departments of Defense and Army have consistently interpreted Secretary's determination as providing blanket exemption.

8. Incorporation of Notice of Potential Foreign Source Competition in request for proposals is not prerequisite to application of exemption to Buy American Act. Failure to include notice in solicitation does not invalidate procurement. Requests for best and final offers are not solicitations but merely continuing negotiations not requiring inclusion of notice.

9. License requirements are matters of responsibility, at heart of which is question whether offeror can perform. We believe that requirement for license from Nuclear Regulatory Commission (NRC) in procurement involving nuclear by-products is satisfied by foreign

offeror whose local representative has qualifying license from State of North Carolina, under State agreement with NRC, and which exempts representative from requirement for obtaining NRC-issued import license.

10. Contracting officer's determination that signer of offer had authority to bind offeror was not unreasonable where evidence before contracting officer included (1) position of signer; (2) inclusion of corporate drawings with proposal; and (3) confirmation from president of corporation designated in offer as authorized to conduct negotiations.

11. Protester asserts that foreign offeror, exempted from Buy American Act, enjoys competitive edge because not subject to United States laws on equal opportunity, clean air, etc., resulting in unequal treatment of domestic offerors. While there may be some validity to this argument, the only mandated handicap enjoyed by American firms in competition with foreign firms is Buy American Act. Since Secretary of Defense determined that it would be inconsistent with public interest to apply Buy American Act, these alleged competitive advantages are not for consideration.

On August 31, 1979, Self-Powered Lighting, Ltd. (SPL), filed a protest with our Office against the award of a contract by the United States Army to Saunders-Roe Developments, Ltd. (SRDL), of the United Kingdom (U.K.), for the furnishing of front-sight post assemblies for the M16/M16A1 rifle. We suspended consideration of the protest because on December 14, 1979, SPL filed suit in the United States District Court for the Southern District of New York, Self-Powered Lighting, Ltd. v. United States, Civil Action No. 79 Civ. 6795 (EW), seeking injunctive and declaratory relief and raising substantially the same issues as raised in the protest. By endorsement, the court has indicated its interest in our decision. For the reasons stated below, we deny the protest.

On July 20, 1978, the United States Army Armament Materiel Readiness Command (the Army) issued a request for proposals (RFP) for the acquisition of front-sight post assemblies for the M16/16A1 rifle in use by the Army. To facilitate night-fire, the sights were to contain a spherical-ended luminescent bead containing tritium, a nuclear by-product, as a result of which the RFP required that offerors be licensed to handle such materials. Offerors intending to use Government-furnished property were required to submit written permission from the contracting officer having cognizance over the property. The solicitation did not contain a "Notice of Potential Foreign Source Competition."

Ultimately, 47 solicitations were issued. Five proposals were received by the date set for receipt of proposals. SPL's offer was low. SRDL's offer was second low and was accompanied by an engineering change proposal seeking approval for the provision of flat-ended rather than spherical-ended beads. SRDL's initial proposal also indicated that SRDL intended to use Government-furnished equipment (GFE) but did not include the required written permission.

By letter dated September 18, SPL was advised of a suspected error in its offer to which SPL responded by increasing its unit price by almost 50 percent, raising it above SRDL's offer. However, although SRDL's offer was now low, SRDL could not be considered for award because its initial proposal did not include the written permission for use of GFE required by the RFP. As a result, SPL remained the low offeror eligible for award.

Best and final offers were requested from each offeror on November 22, 1979. Although SPL remained the low, eligible offeror after submission of best and final offers, action to award the contract to SPL was halted because SRDL had been asked to submit its best and final offer without being advised of its ineligibility for award. Consequently, a new round of best and final offers was requested with advice to offerors that the RFP's GFE requirements had to be strictly complied with and that the tritium beta lights could have either spherical ends, as originally specified

in the RFP, or flat ends, as the result of acceptance of SRDL's engineering change proposal. SRDL's new best and final offer advised that it would not use GFE. With this submission, SRDL displaced SPL as the low, eligible offeror. The contracting officer verified the authority of the signer of SRDL's offer to commit SRDL to a contract and awarded the contract to SRDL.

The protester alleges numerous deficiencies in the solicitation and procedures leading to the award of this contract. We will treat each of these in turn.

(1) Use of Negotiated Procedures

The authority cited for the negotiation of this procurement is 10 U.S.C. § 2304(a)(10) (1976), which provides an exemption to the statutory preference for the use of advertised procedures where it is determined that it is "impracticable to obtain competition." The contracting officer's determination and findings (D&F) underlying the decision to negotiate this procurement justifies use of the exemption on the basis that there is only one known supplier for the radioactive material, Minnesota Mining and Manufacturing Company (3M), and in view of the improbability of competition, that the best interests of the Government would be served by being able to obtain cost and pricing data. (Information regarding an offeror's costs and pricing may be required under the Truth in Negotiations Act, 10 U.S.C. § 2306(f), in a negotiated procurement.)

SPL contends that the D&F is erroneous, that the contracting officer immediately became aware of the existence of potential competition, and that, therefore, the basis for use of the exemption became invalid. SPL argues that the contracting officer should have immediately canceled the RFP and rewritten the requirement as an invitation for bids (IFB) under advertised procedures. SPL contends that by proceeding further under a pretense that competition was impracticable, the contracting officer was violating the terms of 10 U.S.C. § 2304.

We note at the outset that SPL's challenge to the use of negotiated procedures in this procurement is untimely under our Bid Protest Procedures, 4 C.F.R. part 20 (1979), which require that allegations of improprieties apparent on the face of a solicitation must be filed prior to the date set for receipt of initial proposals. 4 C.F.R. § 20.2(b)(1) (1979). Despite SPL's characterization of its argument as a challenge to the D&F, SPL's real objection is to the use of negotiated rather than advertised procedures in this procurement which was apparent on the face of the solicitation. We note also that by its participation in the procurement, SPL may be considered to have waived its objection. Airco, Inc. v. Energy Research and Development Administration, 528 F.2d 1294 (7th Cir. 1975). Nonetheless, we will consider the question on the merits since the court has expressed an interest in our decision. See, e.g., Informatics, Inc., B-194734, August 22, 1979, 79-2 CPD 144.

Our review of contracting officers' determinations under 10 U.S.C. § 2304(a)(10) to negotiate due to the impracticability of securing competition is limited to ascertaining whether there is a reasonable basis for the determination. Department of Commerce; International Computaprint Corporation, 57 Comp. Gen. 615, 622 (1978), 78-2 CPD 84; 41 Comp. Gen. 484 (1962). The D&F here is based on the contracting officer's assessment of two principal factors--the history of similar prior procurements and the licensing requirements applicable to the handling of radioactive materials--which the contracting officer believed would limit competition. In this connection, the Army decided in this procurement to substitute tritium for promethium, used as the light-emitting element in past procurements of low-light front sights. 3M is the only domestic producer of promethium and, as a result, all prior contracts for the promethium-based sight had been awarded to 3M. Both tritium and promethium are low-level radioactive materials subject to regulation and licensing as nuclear by-products. The contracting officer was of the opinion that there was sufficient similarity between the current and prior procurements so that negotiation was justified on the same basis. While there may be room for disagreement with the

contracting officer's conclusion, we find no basis upon which we might conclude that his assessment was not rationally based.

(2) Responsiveness of SRDL's Offer

The protester contends that SRDL's failure to comply with the GFE requirement and its offer of a flat, rather than spherical-ended, bead rendered SRDL's offer nonresponsive to the terms of the solicitation. SPL argues that SRDL's offer, being nonresponsive initially, could not later be made responsive through discussions.

The rigid rules of bid responsiveness in formally advertised procurements do not apply to negotiated procurements. TM Systems, Inc., 56 Comp. Gen. 300 (1977), 77-1 CPD 61. The fact that an initial proposal may not be fully in accord with the requirements of the RFP is not sufficient reason to reject the proposal if the deficiencies are reasonably susceptible to being made acceptable through negotiations; one of the basic purposes of a negotiated procurement is to determine whether deficient proposals are reasonably susceptible to being made acceptable through discussions. NCR Corporation, B-194633.2, September 4, 1979, 79-2 CPD 174. In such procurements, "nonresponsiveness" is ordinarily considered to be a subject for negotiation. DPF Incorporated, B-180292, June 5, 1974, 74-1 CPD 303; 51 Comp. Gen. 247 (1971).

To the extent that SRDL's asserted "nonresponsiveness" is relevant, it meant only that SRDL could not be awarded the contract on the basis of its initial proposal. The real question here is whether SRDL's proposal should have been included in the competitive range for the conduct of negotiations.

The determination whether a proposal is in the competitive range is primarily a matter of administrative discretion and ordinarily will be accepted by this Office, absent a clear showing of unreasonableness. Western Design Corporation, B-194561, August 17, 1979, 79-2 CPD 130; RAI Research Corporation, B-184315, February 13, 1976, 76-1 CPD 99. To

be deemed unreasonable, it must be clear from the record that there was no rational basis for the evaluation. Joanell Laboratories, Inc., 56 Comp. Gen. 291 (1977), 77-1 CPD 51. An unacceptable initial proposal should not be excluded from negotiations if it is reasonably subject to being made acceptable through discussions. DPF Incorporated, supra; 51 Comp. Gen. 247 (1971); 51 Comp. Gen. 431 (1972).

We find nothing in SRDL's offer which might not have been cured through negotiations. SRDL's failure to meet the GFE requirement could easily be remedied by advising SRDL of the deficiency and requiring it either to furnish the required written permission for the use of GFE or forego its use. And, we find nothing wrong with including SRDL in the competitive range while its engineering change proposal was under consideration. Consequently, we find no merit in SPL's contention that SRDL's offer should have been rejected as "nonresponsive" and we believe it was proper to include SRDL in the competitive range.

(3) Conduct of Discussions

The provisions of Defense Acquisition Regulation (DAR) § 3-805.3(a) (1976 ed.) require that offerors be advised of deficiencies in their proposals. Generally, once discussions are initiated with an offeror, the procuring agency must point out all deficiencies in that offeror's proposal where the applicable regulation so requires. E-Systems, Inc., B-191346, March 20, 1979, 79-1 CPD 192; Checchi and Company, 56 Comp. Gen. 473 (1977), 77-1 CPD 232; Teledyne Inet, B-180252, May 22, 1974, 74-1 CPD 279. The Army concedes that its initial request to SRDL for a best and final offer made no mention of the GFE problem in SRDL's proposal. We believe, as did the Army, that this request fell short of the requirement for meaningful discussions, necessitating a second round of best and finals with advice to all offerors, including SRDL, that the solicitation's GFE provisions required strict compliance. SRDL's response confirmed its price and advised that its initial proposal was in error and that SRDL did not actually intend to use GFE, thereby making SRDL's offer consonant with the solicitation.

Buy American Act

SPL raises two questions concerning the application of the Buy American Act to this procurement. SPL contends first that SRDL's offer was improperly exempted from the application of the Buy American Act differentials provided for in section VI of the Defense Acquisition Regulation and, second, that the solicitation did not contain the mandatory notice to domestic offerors of potential foreign competition; SPL contends that absent such notice, the contracting officer had to apply the Buy American Act differentials to SRDL's offer. We think SPL is wrong on both counts.

The Buy American Act, 41 U.S.C. § 10(a) (1976), requires that only domestic source end products be acquired for public use unless the head of the department concerned determines it to be inconsistent with the public interest or the cost to be unreasonable. The act is implemented within the Department of Defense by section VI of the DAR, which provides for a percentage additive factor to be applied to offers of nondomestic source end products. DAR § 6-104.4 (1976 ed.). The Army states that the purchase of these defense materials from the U.K. is exempt from application of the Buy American Act differentials under the terms of a Memorandum of Understanding (MOU) between the United States and the U.K. dated September 24, 1975, as implemented by a Secretarial Determination and Finding (D&F) dated November 24, 1976.

SPL contends that application of the exemption to this transaction conflicts with the first paragraph of the D&F which recites, in part, section 814(a) of the Department of Defense (DOD) Appropriation Authorization Act, 1976 (89 Stat. 544), as amended by section 802 of the DOD Appropriation Authorization Act, 1977 (P.L. 94-361), authorizing the Secretary of Defense to determine that waiver of the Buy American Act would be in the public interest when it is necessary to procure equipment manufactured outside the United States in order to acquire NATO standardized or interoperable equipment for the use of United States forces stationed in Europe and stating that the "Secretary of Defense

shall, to the maximum feasible extent, initiate and carry out procurement policies to effect that policy." SPL argues, in effect, that this paragraph limits the applicability of the D&F to a specific class of transactions--procurements for United States forces in Europe--and that the D&F therefore may not be used in this purchase of parts for domestic use. We think SPL misconstrues the Secretary's D&F.

We note at the outset that contrary to SPL's assertions, section 802 of the DOD Appropriation Authorization Act, 1977, supra, was drafted not as a transaction limitation, but to insure that the Secretary of Defense considered cost, function, quality and availability of the equipment to be procured while carrying out the policy of NATO standardization and interoperability. House-Senate Joint Conference Report on H.R. 12438, Authorizing Appropriations for FY 77 for Military Procurement, S. Rept. 94-1004, H. Rept. 94-1305, 94th Cong., 2d Sess. (1976), reprinted in 122 Cong. Rec. 20611, 20625 (1976). The Secretary's determination in the D&F is based on the statutory authority conferred upon heads of departments under the Buy American Act to exempt from the application of the act those products for which the head of the department determines such exemption would be in the public interest. The Secretary's determination in the D&F, by its terms, applies to "the class of items described" in the D&F. Paragraph 5 of the D&F identifies the articles to which the D&F applies as "* * * all items of UK produced or manufactured Defense equipment other than those items which have been excluded under the MOU * * *." We find nothing in the MOU which would exclude these rifle sights.

In this connection, we note also that part of SPL's argument is based on the premise that NATO standardization and interoperability is not a consideration in this procurement. Contrary to SPL's assertion, however, SRDL's engineering change proposal, accepted by the Army, justifies the switch from spherical to flat-ended tritium beads on the basis that the flat-ended beads are NATO standard.

Furthermore, both the Departments of Defense and the Army have consistently interpreted the MOU and the Secretarial D&F to have created a blanket exemption from the provisions of the Buy American Act for U.K. defense products with the exception of those products excluded from the MOU. In a memorandum dated May 16, 1977, for the Secretaries of the Military Departments and the directors of various defense agencies concerning the MOU, the Secretary of Defense stated the applicability of the exemption to be:

> "Except where restricted by (1) provisions of US National Disclosure Policy (NDP); (2) U.S. laws or regulations; or (3) U.S. Defense Mobilization Base Requirements; * * * this guidance shall apply to all procurements of defense items and related services (to include components, subsystems, and major systems at all technology levels, and at any phase of the procurement cycle from concept definition through production)." (Emphasis supplied.)

Procurement Information Letter (PIL) 79-1, issued by the Assistant Secretary of the Army on January 2, 1979, echoes this interpretation. We share this view. See Crockett Machine Company, B-189380, February 9, 1978, 78-1 CPD 109. The protester has pointed to no law or regulation falling within the three exceptions cited in the D&F and we have found none which would prohibit application of the exemption in this procurement. Consequently, we think the contracting officer was correct not to apply the Buy American Act differentials to SRDL's offer.

SPL's further argument that our holding ignores the first paragraph of the Secretary's D&F does not persuade us that our interpretation is incorrect. We agree with SPL that the entire document must be read together and that meaning and effect should be given to all of its parts. We do not agree with SPL, however, that the first paragraph of the D&F limits its applicability only to procurements for the benefit of United States Forces in Europe. Rather, we view this paragraph, together with paragraph 5 of the D&F, as

reflecting the Secretary's efforts to implement "to the maximum feasible extent" a congressionally recognized policy by extending to the U.K. a blanket exemption from application of the Buy Amercian Act differentials unless the items being procured are either expressly excluded or they fall within legal prohibitions against procurement from a nonnational source.

SPL's second contention regarding the Buy American Act is based on the premise that the Notice of Potential Foreign Source Competition required to be in a solicitation when foreign competition is anticipated is a condition precedent to waiver of the Buy American Act differ entials. We observe two problems with this argument. As stated in Crockett, supra:

> "They are (1) the U.K. Defense items are already exempted under our previous analysis from such application; and (2) an otherwise unconditional exception to the application of the Buy American Act differential would be conditioned on a given procuring activity within the Department of Defense first having some reason to suspect that an item manufactured in the U.K. might be offered."

In cases since Crockett, we have consistently held that the failure to incorporate the notice in a solicitation does not invalidate the procurement. Maryland Machine Tool Sales, B-192019, July 6, 1978, 78-2 CPD 14; Dosimeter Corp. of America, B-189733, July 14, 1978, 78-2 CPD 35; Watkins-Johnson Company, B-195805, B-196036, February 7, 1980, 80-1 CPD ___.

We also find unpersuasive SPL's characterization of the Army's requests for best and final offers as "solicitations" and the assertion of a continuing duty on the part of the contracting officer to advise the domestic competitors of the presence of U.K. competition in connection with such "solicitations." We agree with the Army that these requests were nothing more than continuing negotiations, rather than the issuance of a sequence of solicitations. To the extent that the contracting officer was supposed to

incorporate the Notice provision, his responsibility applied only to the initial solicitation if the possibility of foreign competition were anticipated. On the record before us, we cannot disagree with the contracting officer's assessment that the possibility of such competition was remote. Consequently, we find no fault with the decision not to incorporate the Notice.

License Requirement

SPL also challenges the award to SRDL on the basis that SRDL does not possess a license issued by the Nuclear Regulatory Commission (NRC), as required by the solicitation. SPL contends that since SRDL does not have such a license, and since SRDL is a U.K. concern not subject to NRC licensing requirements and could not obtain such a license, award of the contract to SRDL directly conflicts with the terms of the solicitation. We do not agree.

There are two separate provisions in the RFP dealing with the subject of licenses. Clause C.44(1)(b) of the RFP advises that offerors must have hazardous material licenses/authorizations prior to award, and the last item in Clause C45A, referring to safety standards, states that the "contractor shall be required to obtain and verify" an NRC license for by-product materials. We believe that SRDL complied with these requirements.

We have long considered license requirements to be matters of responsibility, at the heart of which is the question whether the prospective contractor can perform (is responsible). 39 Comp. Gen. 655 (1960); 46 Comp. Gen. 326 (1966); 51 Comp. Gen. 377 (1971). We are of the view that a contracting officer may determine a bidder to be responsible if in his or her judgment the contractor will be able to perform and will have all of the Federal licenses or authorities necessary to performance at the time required for performance. Award of the contract prior to the awardee obtaining the necessary Federal licenses is

conditioned upon the awardee obtaining the Federal license prior to performance, and, if the condition is not met by the time of performance, the contract may be defaulted. 46 Comp. Gen. 326, supra; see generally What-Mac Contractors, Inc., 58 Comp. Gen. 767 (1979), 79-2 CPD 179.

Under the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011, et seq. (1976), the NRC has the authority to regulate and license commerce in nuclear materials, including by-products. We agree with the parties that SRDL's U.K. operations are neither subject to nor required to be licensed by the NRC, but we think that SRDL operations within the United States would be subject to the act. In this connection, however, we note that the NRC is authorized by the provisions of 42 U.S.C. § 2021, as amended, to execute an agreement with the Governor of any State to provide for State regulation of commerce in nuclear materials within that State, with certain exceptions, such as the importing of nuclear materials, reserved to the NRC. North Carolina is a so-called "agreement state" with the authority to regulate nuclear by-products. 1 Nuclear Regulation Reporter (CCH) ¶19001; North Carolina Radiation Protection Act, §§ 104E-1, et seq., General Statutes of North Carolina. On June 29, 1977, the North Carolina State Board of Health issued a radioactive material license to "Eric James Paisley-Representative, Saunders-Roe Developments, Ltd.," to demonstrate and distribute tritium capsules "manufactured by Saunders-Roe Developments, Ltd.," and authorizing possession of these devices in accordance with the terms of the license. Under the provisions of 10 C.F.R. § 110.11 (1979), this grant of a special license authorizing possession of by-product materials would exempt SRDL from the requirement for an NRC-granted import license.

It is our view that SRDL has complied with the licensing requirements of the solicitation. Furthermore, we are not dissuaded from this view by SPL's somewhat strained contention that the North Carolina license is personal to Mr. Paisley and may not be considered as complying with a requirement for licensing of the contractor; we note in this connection only that the license was issued to Mr. Paisley in what

appears to be his representative capacity and we find it difficult to imagine what more could be expected of a foreign contractor in a regulated industry than that its United States representative possess a qualifying license. In these circumstances, we do not think that award of the contract to SRDL contravenes the licensing requirements of the solicitation.

In a submission to our Office dated February 26, 1980, SPL raised a new argument, contending that the license issued to SRDL by the State of North Carolina is of no value in meeting the licensing requirements of the solicitation because, as SPL states: "It must be equally clear that one state (North Carolina, here) cannot authorize interstate transit of nuclear material, so that even if such a state does issue a manufacturing-use-storage, etc., license it would be restricted to intrastate application." While we might agree with SPL's argument as a general proposition, we believe that SPL misapprehends the impact of SRDL's license in this case.

Summarizing very briefly, the interstate transportation of hazardous materials, including radioactive materials, falls under the provisions of the Hazardous Materials Transportation Act, Title I of Pub. L. 93-633, 49 U.S.C. §§ 1801, et seq., which gives the authority to regulate such commerce to the Secretary of Transportation. Regulations governing the shipment of radioactive materials generally may be found at 49 C.F.R. §§ 173.389, et seq. (1978). Properly packaged foreign-produced radioactive materials may be introduced into the interstate transportation system with the approval of the Department of Transportation. 49 C.F.R. § 173.393b (1978).

We believe it is a fair summary of the rather complicated regulatory scheme governing the interstate transfer of these materials to state that the end points in the transaction chain, the manufacturer or distributor and the recipient or user, fall under the regulatory authority of the NRC or their respective states, whereas carriers performing the shipments fall under the authority of the Department of Transportation (DOT). We believe that so long as both the distributor and the

recipient are either licensed or exempt from licensing by the NRC or their respective states, and the carrier transferring the materials between them complies with the Federal regulatory requirements for carriage of these materials, the transaction is permissible. Consequently, the question whether the NRC-recognized regulatory authority of the State of North Carolina or any other State may or may not be projected into interstate commerce is of no relevance.

Authority of Signer of SRDL's Offer

SPL challenges the contracting officer's determination that the signer of SRDL's bid had the authority to bind SRDL. The record is somewhat confused in this regard, at least partially as the result of the involvement in this matter of two similarly named corporations: Saunders-Roe Developments, Ltd. (SRDL), of the U.K., the offeror and awardee; and Saunders-Roe Developments, Inc. (SRDI) of North Carolina. SRDL's offer is signed by "D.G. Guthrie, Managing Director." On July 24, 1979, 1 week prior to award, the contracting officer sought confirmation of Mr. Guthrie's authority to bind SRDL by telephone inquiry to SRDI. A return telegraphic message, signed by Mr. Eric Paisley, as president of SRDI, confirmed Mr. Guthrie's authority to bind SRDL. We presume from the award of the contract that the contracting officer considered this sufficient evidence of Mr. Guthrie's authority.

SPL challenges the contracting officer's determination on the basis that SRDL and SRDI are separate corporate entities, that there is nothing in the record to connect them, and that the contracting officer erred in accepting confirmation from an official of an unrelated domestic concern of Mr. Guthrie's authority to bind the foreign offeror. SPL, in effect, contests the basis of the contracting officer's determination and argues that his decision was arbitrary. For the reasons which follow, we think SPL is incorrect.

The burden rests on each offeror to establish the authority of the signer, either by a form 129 filed prior to bid opening or receipt of proposals (preferable), or by presentation of sufficient evidence submitted when the signer's authority is questioned. The

weight of evidence required to establish the authority of the signer of an offer is for the determination of the contracting officer. J.W. Bateson Co., Inc., B-189848, December 16, 1977, 77-2 CPD 472; General Ship and Engine Work, Inc., 55 Comp. Gen. 422, 426 (1975), 75-2 CPD 269; Atlantic Maintenance Company, 54 Comp. Gen. 692 (1975), 75-1 CPD 108. The evidence may be submitted at anytime prior to award, so long as it is provided promptly when requested. Corbin Sales Corporation, B-182978, June 9, 1975, 75-1 CPD 347; Forest Scientific, Inc., B-192827, B-192796, B-193062, February 9, 1979, 79-1 CPD 188. "Evidence," in this context, is not limited to documents; authority may be inferred from the position held by the signer or by knowledge obtained by other means. General Ship and Engine Works, Inc., supra.

We find no basis here for concluding that the contracting officer acted incorrectly in determining that Mr. Guthrie had the authority to bind SRDL. Initially, we note that, contrary to SPL's suggestion, the contracting officer had clear evidence of a relationship between SRDL and Mr. Paisley because he was designated in SRDL's proposal as one of the parties authorized to conduct negotiations on behalf of SRDL. Second, we note that in English parlance the title of "Managing Director" commonly connotes a position akin to that of the president of a United States corporation whom we would expect to have the authority to bind the corporation. Third, we note that SRDL's initial proposal included SRDL technical drawings as part of its engineering change proposal. Fourth, and finally, we note that Mr. Paisley was president of SRDI at the time he confirmed Mr. Guthrie's authority. We think these factors, taken together, establish a reasonable basis for the contracting officer's affirmative determination of Mr. Guthrie's authority.

Unequal Treatment

Lastly, SPL asserts that because SRDL is not subject to United States laws regarding equal opportunity, clean air, etc., SRDL enjoyed a competitive advantage and that domestic bidders, therefore, were treated unequally. The Secretary's D&F constitutes a

determination that "it is inconsistent with the public interest" to apply the Buy American Act differentials to U.K. defense material, which is the only mandated handicap enjoyed by American firms in competition with foreign firms. We believe that the questions SPL raises in this regard, while possibly valid, fall within the sphere of the Secretary's "public interest" determination which is the product of an exercise of Secretarial discretion requiring the balancing of conflicting policies and considerations and foreclosed from our review. Keuffel & Esser Company, B-192083, July 17, 1979, 79-2 CPD 35; Brown Boveri Corporation, 56 Comp. Gen. 596 (1977), 77-1 CPD 328; Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181.

For the foregoing reasons, SPL's protest is denied.

Milton J. Socolar

For the Comptroller General
of the United States