Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sabreliner Corporation

File: B-275163; B-275163.2; B-275163.3

Date: December 31, 1996

Kenneth B. Weckstein, Esq., and Janine S. Benton, Esq., Epstein, Becker & Green, for the protester.
Lisa V. Gressel, Esq., for General Electric Company, an intervenor.
Clarence D. Long III, Esq., and John E. Lariccia, Esq., Department of the Air Force, for the agency.
Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Solicitation for overhaul of Air Force-owned aircraft engines, for which replacement parts are furnished by the government, is properly considered by the agency to be contract for services to which Buy American Act does not apply.

DECISION

Sabreliner Corporation protests the specifications in request for proposals (RFP) No. F41608-96-R-49674, issued by the Department of the Air Force for overhaul and repair services on the J85 aircraft engine and management items subject to repair associated with the engine. Sabreliner argues that the Buy American Act (BAA) (41 U.S.C. § 10a (1994)) applies to this requirement and that offers should be evaluated giving preference to American-made end products.[1]

We deny the protest.

[1]At the request of Sabreliner, the Air Force has amended the RFP more than once in an effort to ensure that all necessary clauses are included and that all clauses are consistent with the type of contract to be awarded. In addition to the BAA, Sabreliner has argued that a number of other clauses should have been included in the RFP. However, in a telephone conference with the parties on November 6, 1996, counsel to Sabreliner conceded that inclusion of these other clauses is not necessary; the crux of Sabreliner's protest is the issue of the applicability of the BAA. Accordingly, we will not address whether the additional clauses were properly excluded by the Air Force.

The RFP, issued on August 9, 1996, contemplated the award of a firm, fixed-price contract for the conduct of depot level repair and overhaul of the J85 engine in accordance with technical order procedures. The awardee will furnish all resources, including test and support equipment, special tooling, material, and engineering support necessary to conduct the overhauls and repairs. The government is to furnish the J85 engines requiring overhaul or repair as well as needed replacement parts. An amendment to the RFP advised prospective offerors that the government considered the acquisition to be for services and that the BAA did not apply. Accordingly, the solicitation does not call for the agency to apply a BAA price adjustment factor as part of the price evaluation. The RFP also incorporated by reference the clause at Federal Acquisition Regulation (FAR) § 52.222-20, Walsh-Healey Public Contracts Act (WHA) (41 U.S.C. §§ 35-45 (1994)), which is applicable to supply contracts and which requires offerors to make certain representations and stipulations and to pay its employees not less than the minimum wage prescribed by the Secretary of Labor.

Sabreliner contends that this procurement is ultimately for supplies, not services alone, and thus, the BAA applies, which calls for a preference for American-manufactured end products. We disagree. The BAA applies to supply contracts exceeding the micro-purchase threshold and to services contracts that involve the furnishing of supplies when the supply portion of the contract exceeds the micro-purchase threshold. FAR § 25.100. The BAA requires, with certain exceptions, that only domestic end products be acquired for public use, and the FAR implements the requirement by the application of stated price evaluation preference factors. FAR §§ 25.105, 25.102(a). "End products" are defined as "articles, materials and supplies . . . acquired for public use under the contract." FAR § 25.101. The contract here is for repair and overhaul services on engines owned by the U.S. Government. While the contractor returns the engines to the government when the services are completed, the government is not acquiring end products; it is simply taking possession of items it already owns. In this regard, we have long recognized that repair and overhaul contracts are basically agreements for services which are outside the scope of the BAA. Bell Helicopter Textron, 59 Comp. Gen. 158 (1979), 79-2 CPD ¶ 431; Bell & Howell Co., B-202114, May 20, 1981, 81-1 CPD ¶ 395.

Sabreliner argues that the inclusion in the solicitation of the WHA clause, instead of the Service Contract Act clause (FAR § 52.222-41), establishes that the contract is one for supply rather than services.[2] However, the agency explains, without

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[2]Sabreliner also notes that prior contracts for the same services contained the BAA clause and other supply clauses. However, as the protester itself recognizes, each federal procurement stands on its own; the Air Force's determination to include the (continued...)

contradiction, that the overhaul and repair of the J85 engines constitutes extensive remanufacturing of the engines and is equivalent to manufacturing. The FAR provides that where, as here, remanufacturing is so extensive as to constitute manufacturing, the WHA applies instead of the Service Contract Act. FAR § 22.1003-6. Thus, there is nothing objectionable in the agency's use of the WHA clause in this service contract, and its use is not inconsistent with the agency's determination that the BAA is inapplicable here.

While it is true that "supply" contracts (manufacture or furnishing of materials, supplies, articles or equipment) generally require the application of the WHA (FAR §§ 22.602, 22.603), application of the WHA does not necessarily mean that the contract must be classified as a supply contract for BAA purposes. The two acts have different purposes. The BAA provides a preference for items manufactured in the United States from materials, articles, or supplies which are mined, produced, or manufactured in the United States, 41 U.S.C. § 10a, and focuses on where and from what materials an item is manufactured. The WHA provides that in government manufacturing contracts over $10,000, contractors must, inter alia, ensure that its employees will be paid the prevailing minimum wage for the locality where the contract is to be performed, 41 U.S.C. § 35, and thus focuses on the how the contractor is to treat its employees. Further, the WHA specifically provides that it "shall not be construed to modify or amend" the BAA. 41 U.S.C. § 42. Accordingly, since the WHA is unrelated to the BAA, application of one does not mandate application of the other, and since services are not subject to the BAA, the agency properly determined that no BAA factor should be included in the price evaluation.

The protest is denied.

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[2](...continued)
BAA clause in prior procurements does not require it to include it here. See Tomahawk Constr. Co., B-254938, Jan. 27, 1994, 94-1 CPD ¶ 48.