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Pro. Law II
K. Ayer

DECISION

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

FILE: B-189733 DATE: July 14, 1978

MATTER OF: Dosimeter Corporation of America

DIGEST:

1. Protest challenging agency's interpretation of documents bearing on propriety of foreign competition and applicability of Buy American Act is timely even though filed some three months after protester questioned agency's interpretation since protester, at time of raising questions, did not have firm basis for knowing what agency's final position would be and therefore did not know basis for protest more than 10 days prior to protest filing date.

2. Where Secretary of Defense has waived application of Buy American Act with regard to purchase of "all" defense items manufactured in the United Kingdom, allegation that waiver is limited to high technology items is without merit.

3. Equipment is properly categorized as "defense equipment," for purposes of Secretary of Defense's waiver of Buy American Act, where such equipment is purchased by military department for use of military personnel notwithstanding fact that equipment also has civilian applications.

4. Memorandum of Understanding between United Kingdom and United States constitutes basis for invoking exception to prohibition against Government purchase of supplies consisting in whole or in part of foreign specialty metals.

Dosimeter Corporation of America (DCA) protests the presence of foreign competition and the anticipated method of evaluation of that competition in connection with the procurement of 6,150 radiacmeters under request for proposals (RFP) DAAB07-77-R-0894, issued by the U.S. Army Communications and Electronics Material Readiness Command [formerly the U.S. Army Electronics Command] (Army).

The solicitation was issued to ten potential offerors, including a United Kingdom (UK) firm, on January 18, 1977. Offers were received from that UK firm, from the protester, and from a subsidiary of the protester. Award has not been made pending establishment of a competitive range and the holding of "contemplated negotiations."

A radiacmeter is a small radiation detection device of the approximate size and shape of a large fountain pen. The user measures gamma and x-ray exposures by looking into one end of the radiacmeter and reading an optical scale.

The contracting officer reports that DCA first questioned the use and application of the Buy American Act (Act), 41 U.S.C. § 10a et seq. (1970), prior to the March 24, 1977 closing date for receipt of initial proposals. Sometime after the closing date DCA learned that a foreign firm might have submitted a proposal. On April 20, 1977 DCA met with representatives of the Army and of the Small Business Administration (SBA) to discuss the propriety of foreign competition. The Army advised DCA that a UK firm had submitted a proposal. DCA was given copies of the following documents which the Army felt supported its position regarding the propriety of considering the UK offer: Army Procurement Information Letter 76-31, dated December 21, 1976 (PIL); Memorandum for Secretaries of Military Departments, dated November 24, 1976 (Secretaries Memo); the reciprocal defense procurement Memorandum of Understanding, dated September 24, 1975, between the United States and the United Kingdom (MOU); Notice of Potential Foreign Source Competition ("Notice"), and the Secretary of Defense's Determination and Findings, dated November 24, 1976 (D&F).

After reviewing the documents DCA, on April 22, 1977, wrote the SBA representative and questioned the interpretation which the Army had given the documents at the April 20, 1977 meeting. DCA's letter was not responded to until August 4, 1977, eight days after it filed its July 27, 1977 protest with this Office. The response was signed by the contracting officer with a copy to the SBA representative.

One allegation initially raised by the protester is that the foreign offer could not be considered because the RFP did not contain the "Notice." However, the Army reports that the solicitation is being modified to include the "Notice" and that, in the posture of this procurement, where DCA is aware of the foreign competition and will have an opportunity to submit a revised proposal, further consideration of the foreign offer would not be prejudicial to DCA. The protester concedes that the solicitation defect has been cured and has declined to "pursue this point further." Accordingly, we will not consider this allegation.

The major contention raised by DCA is that under a proper interpretation of the documents mentioned above there is no basis for regarding the Buy American Act as having been waived for this procurement. However, before reaching the merits of that contention, we must consider whether the protest is timely.

The Army argues that DCA knew of the foreign offer prior to the April 20, 1977 meeting and that the April 22, 1977 letter to the SBA representative is evidence that DCA was in full command of all of the facts which precipitated the protest. The Army concludes that DCA either knew or should have known the basis of its protest on April 22, 1977 and that a protest filed more than three months after that date contravenes our Bid Protest Procedures which require that a protest be filed not later than 10 days after the basis of the protest is known or should be known. 4 C.F.R. § 20.2(b)(2) (1977). DCA, on the other hand, argues that the letter of April 22 was a protest and that it regarded the absence of a response after 3 months to be adverse agency action on the protest, which prompted the July 27 protest to this Office.

We do not agree that the April 22 letter to the SBA representative can be regarded as a protest letter. First, it was not filed with the contracting officer or even with the procuring agency; second, it raised several questions concerning the RFP and sought additional assistance from the SBA representative but did not in any way manifest an intention to protest.

Nonetheless, we view the protest as timely filed. The issue presented at this point concerns the proper interpretation to be given the documents bearing on this procurement, and not whether foreign competition was to be permitted. DCA was given copies of those documents on April 20, 1977; after reading them it raised questions about their application to the procurement. Although the questions were directed to the SBA representative, the DCA letter reflects an understanding that the answers were to come from Army procurement personnel, and DCA states that from time to time it was told by the procurement office, as well as the SBA representative, that a response would be forthcoming. Since, during this period, the Army took no further procurement action (such as entering into negotiations with the offerors) that would have suggested that the questions had been resolved in a way inimical to DCA's interest, we do not think we would be justified in concluding that DCA had any firm basis for knowing what the Army's final position would be with respect to the interpretation to be given the MOU and other documents. Accordingly, we cannot say that DCA was aware of the basis for protest on April 22, and consequently, we find the protest filed here to be timely.

The issue before us is whether under a proper interpretation of the documents, the Buy American Act has been waived for this procurement. The Act at 41 U.S.C. § 10a states in pertinent part 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.

The D&F recites "that for the class of items described herein, it is inconsistent with the public interest to apply the restrictions of the Buy American Act." The phrase "class of items described herein" is defined in paragraph 5 of the findings portion of the D&F as follows:

> "This Determination and Findings covers all items of UK produced or manufactured Defense equipment other than those items which have been excluded from consideration under the MOU for reasons of protecting National requirements such as for the maintenance of a Defense mobilization base, and those items subject to legally imposed restrictions on procurement from non-national sources." (Emphasis supplied.)

DCA argues that the waiver provided in the D&F should be restricted in its application to certain items of advanced, high technology defense equipment. In establishing this argument DCA turns, initially, not to the D&F itself, but to the MOU which is referenced in the findings portion of the D&F. First, DCA points to the following passage:

> "The Government of the United States (USG) and the Government of the United Kingdom of Great Britain and Northern Ireland (HMG), hereinafter referred to as the Governments, are developing high technology weapons systems and other advanced items of defense equipment and are seeking to achieve greater cooperation in research, development, production and procurement in these areas in order to make the most rational use of their respective industrial, economic and technological resources, to achieve the greatest attainable military capability at the lowest possible cost, and to achieve greater standardization and interoperability of their weapons systems.
>
> "The Governments already have an Arrangement dated May 1963 for Joint Military Development and the USG has certain offset arrangements with HMG against purchases by HMG of major weapons systems and items of defense equipment.

> "In order to further the above aims; the Governments have decided to enter into an understanding and this Memorandum sets out the guiding principles governing mutual cooperation in defense equipment production and purchasing and associated offset arrangements. This Memorandum is intended to fit into the broader context of NATO Rationalization/Standardization and to be compatible with any NATO arrangement that might subsequently be negotiated."

DCA argues that this language indicates that the main purpose of the MOU was a desire to achieve greater cooperation in the research, development, production and procurement of high technology weapons systems and other advanced items of defense equipment. Second, DCA points to the following section of the MOU as evidence that waiver of the Act should be limited to certain specific items rather than all items of United Kingdom origin:

> "The Governments will identify and nominate for consideration by each other items of defense equipment believed suitable to satisfy their respective requirements. The Governments will decide between them, to which items of defense equipment purchases this Memorandum of Understanding (MOU) will apply and whether the items may be procured on a Government-to-Government or Government-to-Industry basis."

The Army, however, takes the position that both the MOU and the PIL clearly indicate that neither government intended to establish an item technology restriction. The Army argues that if such an item technology restriction had been intended, the MOU would have spelled out the applicable item class or classes with great precision. As further support for its position, the Army cites the following segment from the Secretaries Memo:

"' Applicability

Except as * * *, 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) * * *.'"

We see no need to interpret the MOU, the PIL, or the Secretaries Memo, for regardless of what is expressed therein, it is the D&F that must be controlling, since the waiver of the Buy American Act in this case is based on that D&F. The D&F of course, represents the determination of the Secretary of Defense pursuant to that Act that it would be inconsistent with the public interest to apply the restrictions imposed under the Act to the category of items covered by the D&F. It is clear from the language of the D&F that the Secretary of Defense did not restrict the subject matter of his waiver to certain specified items of defense equipment. The Act is waived for all items of UK produced or manufactured defense equipment unless the items are expressly excluded or of such nature as to fall within legal prohibitions against procurement from non-national sources. See Crockett Machine Company, B-189380, February 9, 1978, 78-1 CPD 109. We therefore find DCA's arguments that the D&F's waiver of the Act is restricted in its application to certain items of advanced, high technology defense equipment to be without merit.

In so concluding, we have considered DCA's assertions that construing the waiver this broadly is unsound for various policy reasons. (DCA argues that such an unrestricted waiver ignores both the Congressional policy in favor of small business and the policy of protecting the industrial mobilization base in the interest of national defense.) The answer, however, is simply that a Secretarial decision to waive, or not waive, the Act is a decision which often requires the balancing of conflicting policies, but in any event is one vested in the discretion of the Secretary. Brown Boveri Corporation, B-187252, May 10, 1977, 77-1 CPD 328.

We have also considered DCA's argument that an unrestricted waiver conflicts with section 802(a)(1) of the Defense Appropriation Authorization Act of 1977, Public Law 94-361, 90 Stat. 923, 930. Section 802 authorizes the Secretary of Defense to determine that waiver of the Buy American Act would be in the public interest when it is determined 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. Section 802(a)(1), however, admonishes the Secretary to "take into consideration the cost, functions, quality, and availability of the equipment to be procured." DCA believes that had the Secretary taken such factors into consideration, he would have concluded that the waiver should not apply to this procurement. We find no merit to this argument, since there is no indication in the record that the Secretary did not consider the listed factors, and since the decision to waive the Act was based on more than NATO standardization considerations.

DCA further argues that, even if we consider the D&F as applying to all defense items and not only to high technology items, the Act has not been waived for this procurement because radiacmeters are not "defense equipment" and because all radiacmeters are in part fabricated with a specialty metal known as iron-nickel which precludes their purchase because of restrictions in Department of Defense appropriation acts as implemented by Armed Services Procurement Regulation (ASPR) 6-300 et seq. (1976 ed.).

DCA argues that radiacmeters cannot be termed "Defense equipment" because in DCA's opinion the primary application of radiacmeters is in the protection of workers in nuclear power reactors, nondestructive testing environments and medical nuclear facilities. We do not agree. We believe that equipment purchased by the Department of Defense for the use of Defense personnel is "Defense equipment" as that term is used in the D&F. That such equipment may have civilian applications as well is immaterial.

With regard to the alleged use of a specialty metal, DCA points to the requirement in paragraph 3.13 of the specification for glass to metal seals. DCA takes the position that:

> "[a]s a practical matter, the requirement for glass to metal seals demands the use of iron-nickel in the seals, since present state-of-the-art technology does not permit the use of any metal other than iron-nickel in glass to metal seals. In this regard, it should be noted that all manufacturers of radiacmeters throughout the world use iron-nickel in their glass to metal seals. Thus, as a practical matter, the Army's specification does require the use of iron-nickel."

ASPR 6-301 defines specialty metal as including "metal alloys consisting of * * * iron-nickel * * * base alloys containing a total of other alloying metals * * * in excess of 10 percent." ASPR 6-302 states:

> "Restriction. Except as provided in 6-303, there shall not be procured supplies consisting in whole or in part of any * * * specialty metals * * * which have not been melted in steel manufacturing facilities located within the United States or its possessions * * *."

The Army does not agree that the specifications require the use of the iron-nickel alloy. We need not resolve this aspect of the issue, however, since we believe the protester's position is without merit in any event. First, there is nothing of record to indicate that whatever would be used in the radiacmeters would meet the definition quoted above. Second, the restriction is not applicable to this procurement. Defense Procurement Circular 76-14, dated March 13, 1978, added a new exception to those listed in ASPR § 6-303. That exception, which implements section 823 of the Department of Defense Appropriation Act, 1978, Public Law 95-111, approved September 21, 1977, 91 Stat. 886, 903-4, which specifically permits the procurement of specialty metals produced outside the United States under certain enumerated circumstances, reads as follows:

"(xi) purchases of specialty metals when such purchases are necessary to comply with agreements with foreign governments requiring the United States to purchase supplies from foreign sources for the purposes of offsetting sales made by the U.S. Government or U.S. firms under approved programs serving defense requirements or where such procurement is necessary in furtherance of the standardization and interoperability of equipment requirements with NATO."

We think that the MOU constitutes both an agreement, with a foreign government requiring that the United States purchase supplies from UK firms in order to offset sales made to the UK, and an approved program which serves the defense requirements of both nations.

For the reasons stated above, the protest is denied.

Deputy Comptroller General
of the United States