

12786 *Bastin*
Protest



DECISION

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

FILE: B-194403

DATE: February 11, 1980

MATTER OF: United States Steel Corporation

DLG00156

DIGEST:

1. GAO will consider domestic supplier of steel an interested party to protest agency's evaluation of that material.
2. Timeliness of protest based on agency's decision to waive Buy American Act is measured from date of waiver not from date that protester learned low bidder intended to use foreign materials.
3. Protest alleging that agency should have evaluated bid using the Buy American Act factors in DAR § 6-104.4 which applies to supplies and services, is denied where solicitation was for construction contract and Act's application ultimately was waived under proper regulation.
4. Although solicitation improperly purported to provide exception for application of Buy American Act prior to receipt of bids, agency ultimately followed proper procedures for not applying Act to United Kingdom Steel.

The United States Steel Corporation protests the award of a contract by the Army Corps of Engineers, New Orleans, Louisiana (Army), to J. Ray McDermott & Company, Inc. (McDermott), under invitation for bids No. DACW29-78-B-0199.

AGCOOTAL

DLG03863

The solicitation was for driving steel sheet piling and levee enlargement of the East Atchafalaya

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[Contract Award Protest]

Basin Protection Levee. U. S. Steel protests the Army's decision to waive the preference for domestic bids specified in the Defense Acquisition Regulation (DAR). The protester believes the waiver violates the Buy American Act, 41 U.S.C. § 10a-d (1976).

The Army contends that U.S. Steel is not an "interested party" within the meaning of 4 C.F.R. § 20.2(a) (1979) because it is merely a prospective subcontractor and not the real party in interest. However, as a domestic supplier of the material in question, we believe that U.S. Steel may be considered sufficiently interested to protest the Army's evaluation of that material. Donald W. Close and Others, 58 Comp. Gen. 297 (1979), 79-1 CPD 134.

The Army also argues that the protest is untimely because U.S. Steel did not protest until five months after it knew that McDermott intended to use foreign steel. In our opinion, however, the basis for U.S. Steel's protest is the Army's decision not to apply the Buy American evaluation requirements. The protest was filed within the 10 working days from the date of that decision, as permitted under our Bid Protest Procedures. 4 C.F.R. § 20.2(b)(2) (1979).

The Army first attempted to waive application of the Act by incorporating in the solicitation a memorandum providing for waiver on certain Corps of Engineer equipment solicitations for civil works projects. However, the memorandum was inapplicable because this procurement was for a construction project. Nevertheless, on the basis of this amendment the Army advised suppliers (including U.S. Steel) and contractors prior to bid opening that United Kingdom steel sheet piling would be treated equally with domestic steel and could be used for this procurement.

U.S. Steel argues that application of the Act should not have been waived and that bids should have been evaluated by applying the preference for domestic

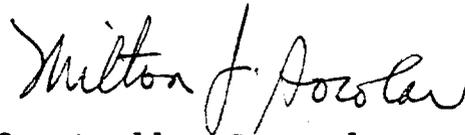
bids as provided in DAR § 6-104.4. That regulation, however, applies only to supply and service contracts. DAR § 6-100. The DAR contains separate provisions applicable to construction contracts in Part 18-505. The Assistant Secretary of the Army ultimately waived application of the Buy American Act under DAR § 18-508.2 after determining that the use of domestic rather than foreign steel would increase the project price by approximately 8.3 percent. This action is consistent with the Buy American Act, which permits the use of foreign materials when it is determined that the cost of domestic materials is unreasonable, Executive Order 10582, 19 Fed. Reg. 8723 (1954), and is not subject to our legal objection. C.R. Fedrick, Inc., 58 Comp. Gen. 493 (1979), 79-1 CPD 309; B-176080, August 2, 1972.

Although we deny the protest, we note it is apparent from the record that the Army failed to follow the proper procedure for determining the application of the Buy American Act. The Buy American Act restrictions do not apply to non-domestic construction material when the Secretary concerned determines prior to bid opening or on the basis of the bids received that domestic material is unavailable, that its use is impracticable or that its cost was unreasonable. Unless an exception to the Act for a particular material is granted prior to bidding, bidders proposing to offer non-domestic construction material must submit, among other things, the estimated costs of the foreign materials and a detailed justification of the impracticability of using domestic materials. Before an agency waives the Buy American Act restrictions after bid opening, it is to determine whether it is feasible to forgo the requirement (in this case steel) or provide a domestic substitute on the basis of the information furnished with the bid. DAR § 18-508.1, 18-508.2.

The agency's improper attempt not to apply the Buy American evaluation factor prior to bid opening was construed by the low bidder in this case as rendering unnecessary the agency's usual process for making that

determination after bid opening. The firm therefore failed to indicate that it was bidding on the basis of foreign steel and did not provide information with its bid to show the unavailability or impracticability of using domestic steel. Nevertheless, the agency has determined through its own investigation that the low bid in fact was based on the use of United Kingdom steel and now has obtained proper approval to purchase nondomestic steel.

The protest is denied.

A handwritten signature in cursive script that reads "Milton J. Fowler".

FOR THE Comptroller General
of the United States