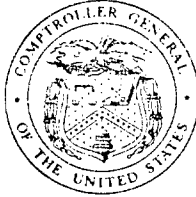


DECISION



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

FILE: B-192879

DATE: April 23, 1980

MATTER OF: TFI Corporation

DIGEST:

DLB 04463

1. Where agency concedes violation by contractor of Buy American certification and it is not practical to remove foreign materials, contract price should be adjusted by difference in cost of domestic products of the quality and quantity involved and the cost of the foreign products delivered.
2. Contracting officer's unilateral referral to SBA of low offeror's eligibility for small business set-aside obviated need for notifying unsuccessful offerors of apparently successful offeror's identity and deadline for filing size protest.
3. SBA's reliance on information furnished by firm whose eligibility for small business set-aside procurement is being questioned is not objectionable because SBA's process for making such determinations is not intended to be adversary in nature.
4. Determination by contracting officer that low offeror furnished a domestic end product is questioned because record discloses that comparison of costs to contractor of domestic and foreign components was not made. Contractor's compliance with certification should be reexamined.
5. Markup charged to contractor by dealer of foreign components is a necessary expense

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[Protest Involving Buy American Issues]

of acquiring foreign components and should be treated as part of contractor's foreign component costs in determining whether a domestic source end product is furnished and whether price was properly evaluated for purposes of Buy American Act.

TFI Corporation (TFI) protests two contract awards by the Department of the Navy to Ridge Instrument Company for installed x-ray equipment systems. Although with respect to both awards the protester raises similar issues related to the implementation of the Buy American Act and to Ridge's conformance to the small business restrictions of the solicitation, we will consider each procurement separately because of factual differences between them. *AGC 00001* *DLG 04/64*

I

Request for proposals No. N60921-78-R-0059 was issued by the Naval Surface Weapons Center, Silver Spring, Maryland, as a small business set-aside for the supply and installation of a 300 KV constant potential x-ray generator system with instruction manual and parts list. Ridge certified in its proposal that it would furnish a domestic source end product for purposes of complying with the Buy American Act, 41 U.S.C. 10a (1976), and its price was evaluated and an award was made to Ridge on the basis that it would furnish a domestic end product. Navy now concedes that Ridge has violated its certification but states that it does not intend to cancel the contract because the x-ray system has been delivered and installed. The Navy, however, citing our decision 48 Comp. Gen. 504 (1969), also states that it intends to negotiate a contract price reduction.

Although the protester requests cancellation of the Ridge contract and award to it as the low responsive, responsible bidder, we note that the protester would not have been awarded the contract even if Ridge's bid had been evaluated as foreign. The protester was fourth low, whereas the products offered by the second low

offeror were eligible to be considered under waiver of the Act's application by the Secretary of Defense for defense-related products of the United Kingdom.

The protester also argues that the contracting officer, when referring the question of Ridge's small business eligibility to the Small Business Administration (SBA) for determination, failed properly to explain to SBA the issue of whether the supplies to be furnished by Ridge would be manufactured by a large business. Moreover, TFI believes the contracting officer failed to comply with the provision in Defense Acquisition Regulation (DAR) § 1-703(b)(1) requiring notification to unsuccessful offerors of the apparently successful offeror and of the deadline for filing a size protest.

The record shows^{ed} that the contracting officer himself questioned Ridge's small business status by protesting to the SBA. Moreover, the contracting officer promptly advised TFI of the SBA's determination that Ridge was considered eligible for the set-aside and TFI was free to pursue this matter with the SBA Size Appeals Board pursuant to 13 C.F.R. 121.3-6(b)(ii) (1979). We are aware of no provision in the procurement regulations requiring the contracting officer to provide offerors notice of a firm's right to appeal to the SBA Size Appeals Board.

In addition, contrary to TFI's allegation that SBA was not advised of the non-small business status of Ridge's suppliers, the contracting officer did point out to SBA that a portion of the equipment being offered was to be manufactured by a large business concern. The fact that SBA, in making its determination, relied on information furnished by Ridge provides no basis for this Office to object to SBA's action since such action was consistent with SBA's procedures for handling protests and appeals of small business status. These procedures are not intended to be adversary in nature. See 13 C.F.R. 121.3-4a-6.

II
also
The second procurement concerned *a Small business protest* Request for Proposals N00123-78-R-0834, issued by the Naval Regional

Procurement Office, Long Beach, California. Also a small business set-aside, the solicitation covered the furnishing and installation of an industrial x-ray system including a lead-lined exposure cabinet. The other major elements of the system are the x-ray tubehead and the power supply/controller, a positioning system and power cables.

The protester questions whether the Navy had reason to believe that Ridge was offering a foreign item because after initial proposals were submitted and prior to award Ridge identified to the Navy the manufacturer of the component x-ray equipment being offered. Irrespective of the Navy's ability to deduce from this information that these components were of foreign manufacture, we note that ultimately the Navy did consider and determine whether Ridge would comply with its certification that it was offering a domestic source end product. However, we find the Navy's analysis to be inconclusive and the question should be reexamined at this time.

In response to the Navy's request for clarification, Ridge advised the Navy that it would meet the technical specifications by furnishing "a Philips MG-160 Constant Potential Industrial X-Ray System with a MCN-161 metal ceramic beryllium window x-ray tubehead." Ridge also indicated that it planned to design and provide a custom exposure cabinet and tubehead support and enclosed literature describing the Philips equipment. As Ridge explained in a subsequent preaward letter: (1) the system proposed included more than an x-ray machine, (2) the equipment purchased from Philips represented only 34.9 percent of the total installed (contract) price, and (3) only 60 percent of the cost of the foreign equipment paid by Ridge was "assignable to a foreign source" (that is Ridge acquired the equipment from a domestic importer which apparently retained for itself as markup 40 percent of the price paid by Ridge for the foreign components).

A proper determination of whether a foreign or domestic end product is being offered must entail, in part, an analysis of the component costs of the end

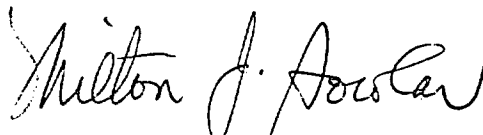
product. See, e.g., 48 Comp. Gen. 727 (1969). More than 50 percent of the total component costs must be attributable to components mined, manufactured or produced in the United States to qualify the end product as domestic in origin. DAR § 6-101(a).

Here the contracting officer treated the end product being procured as consisting of the x-ray system taken as a whole. The Philips x-ray machine (consisting of tubehead, power supply and console) was among the items which would make up this system, leading the contracting officer to view the equipment which Ridge would purchase from Philips as components. Because the exposure cabinet, wiring and tubehead support (positioning system) would be manufactured by Ridge or would be purchased from other domestic sources, the contracting officer, comparing the cost of the foreign components, before markup, with the total contract price, concluded there was no possibility that the 50 percent foreign component test would be violated.

We believe that this conclusion is unwarranted on the record. First, the contracting officer seems to have accepted without explanation Ridge's assumption that the markup charged by its supplier, a domestic importer, is not properly considered part of the cost of foreign components. However, the markup was applied by a dealer which apparently is not affiliated with the contractor but may be affiliated with the manufacturer. We view such a markup as a necessary expense of acquiring the foreign components which should be treated as part of the contractor's foreign component cost. Cf. 35 Comp. Gen. 7, 9 (1955). Second, the fact stressed by the contracting officer that the cost of foreign components, including the markup, amounts to approximately 35 percent of the total contract price, does not establish that the system being procured is a domestic source end product. In this regard, the record does not show that the Navy has sufficient evidence to establish that the cost of domestic components exceeds 50 percent of the total component

costs. We note in the case of the first procurement discussed in this decision that a reexamination of the cost to Ridge of its foreign components ultimately resulted in a determination that the end item furnished was foreign. Accordingly, we recommend that the Navy perform a more precise comparison of the cost of domestic versus foreign components. In the event the Navy finds that the end product furnished is foreign rather than domestic a contract price reduction should be negotiated.

Finally, TFI protests Ridge's eligibility for award of this small business set-aside procurement. However, such matters are for consideration by the SBA, not this Office. National Ambulance Service of Louisiana, Inc., B-193447, January 22, 1979, 79-1 CPD 40. Moreover, the Navy has advised us that the matter was forwarded to the SBA for its consideration in future actions as provided in DAR § 1-703(b)(1)(c). In the circumstances, we see no need for further action by this Office.



Acting Comptroller General
of the United States