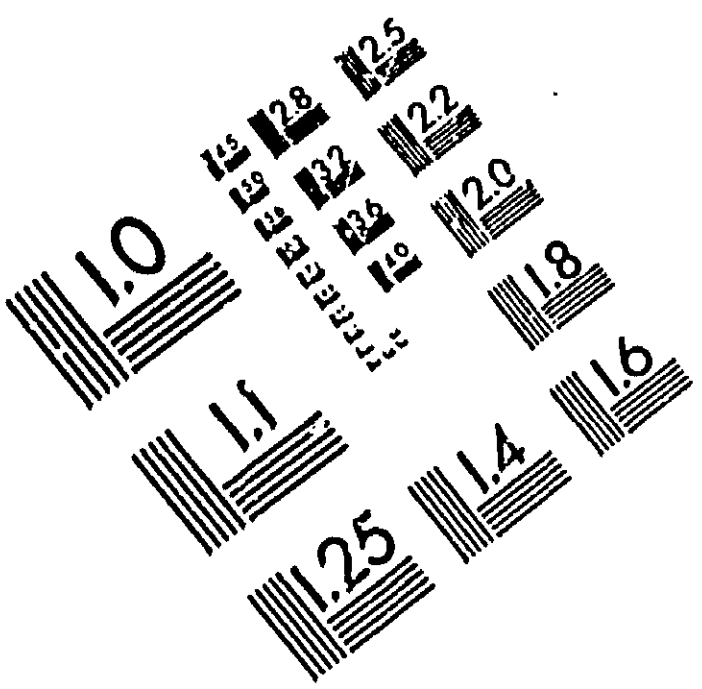


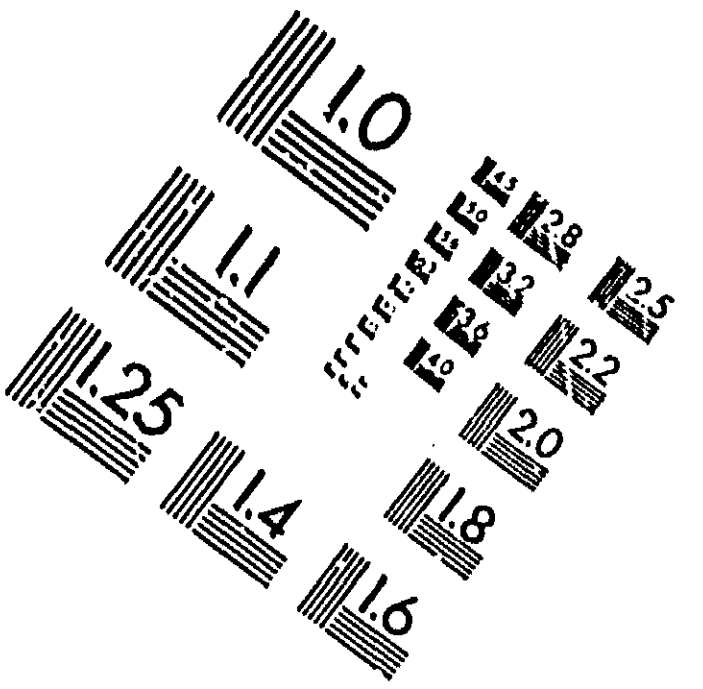
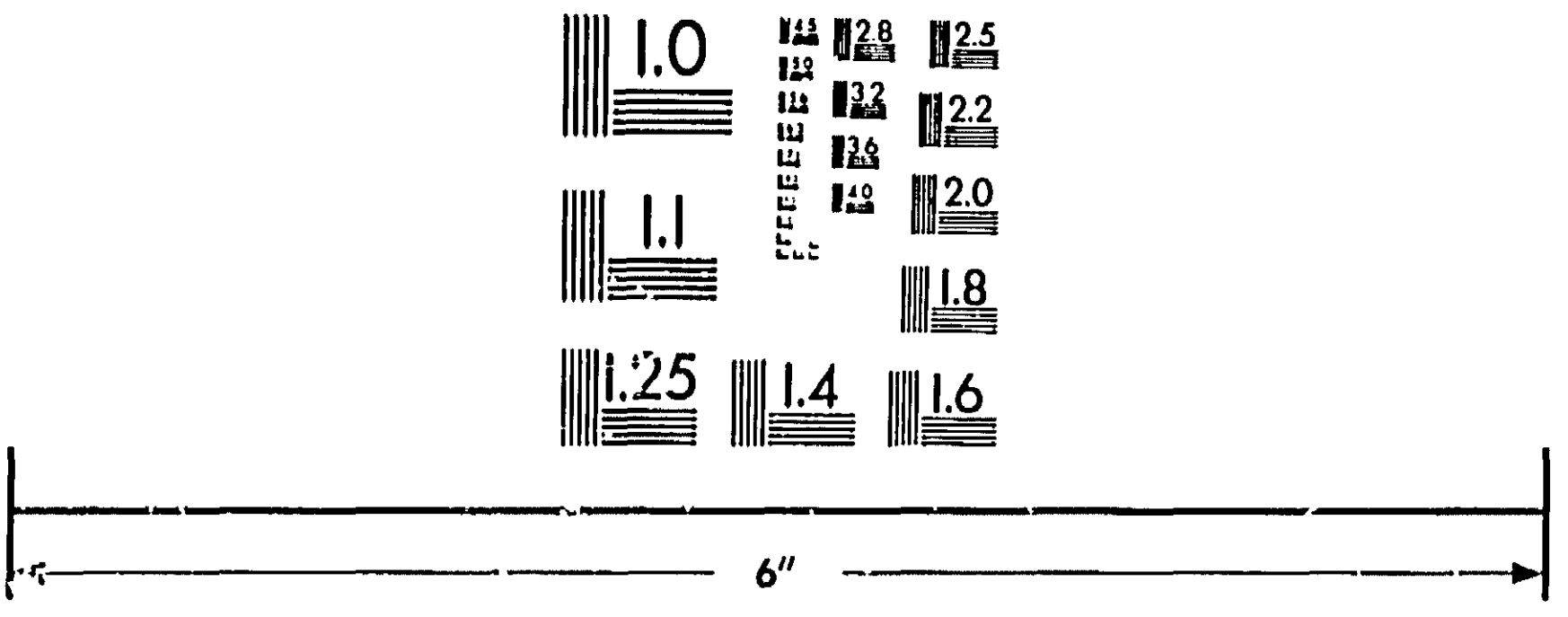
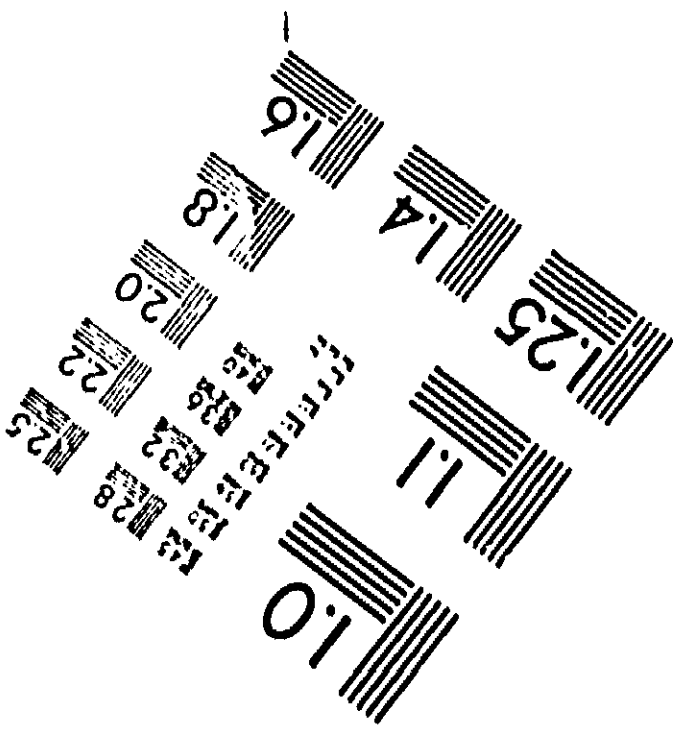
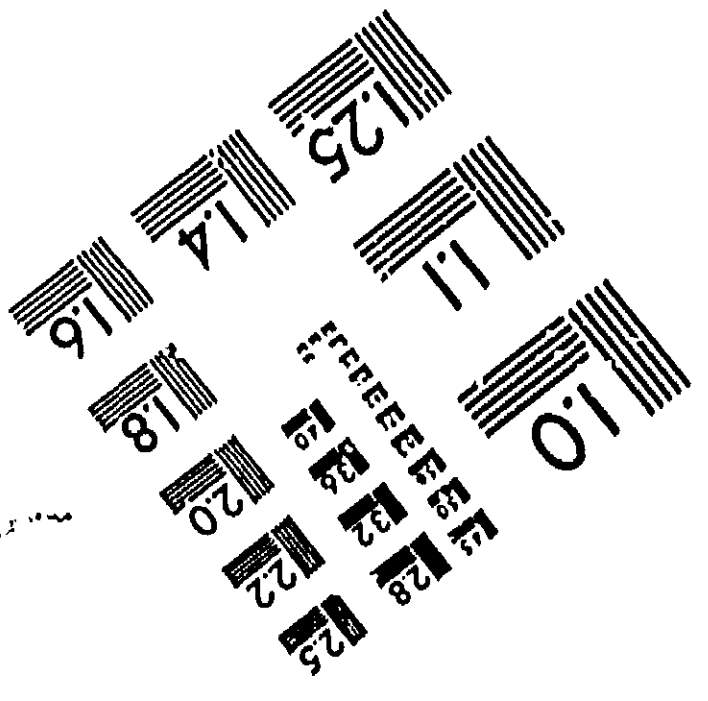


IMAGE EVALUATION
TEST TARGET (MT-3)







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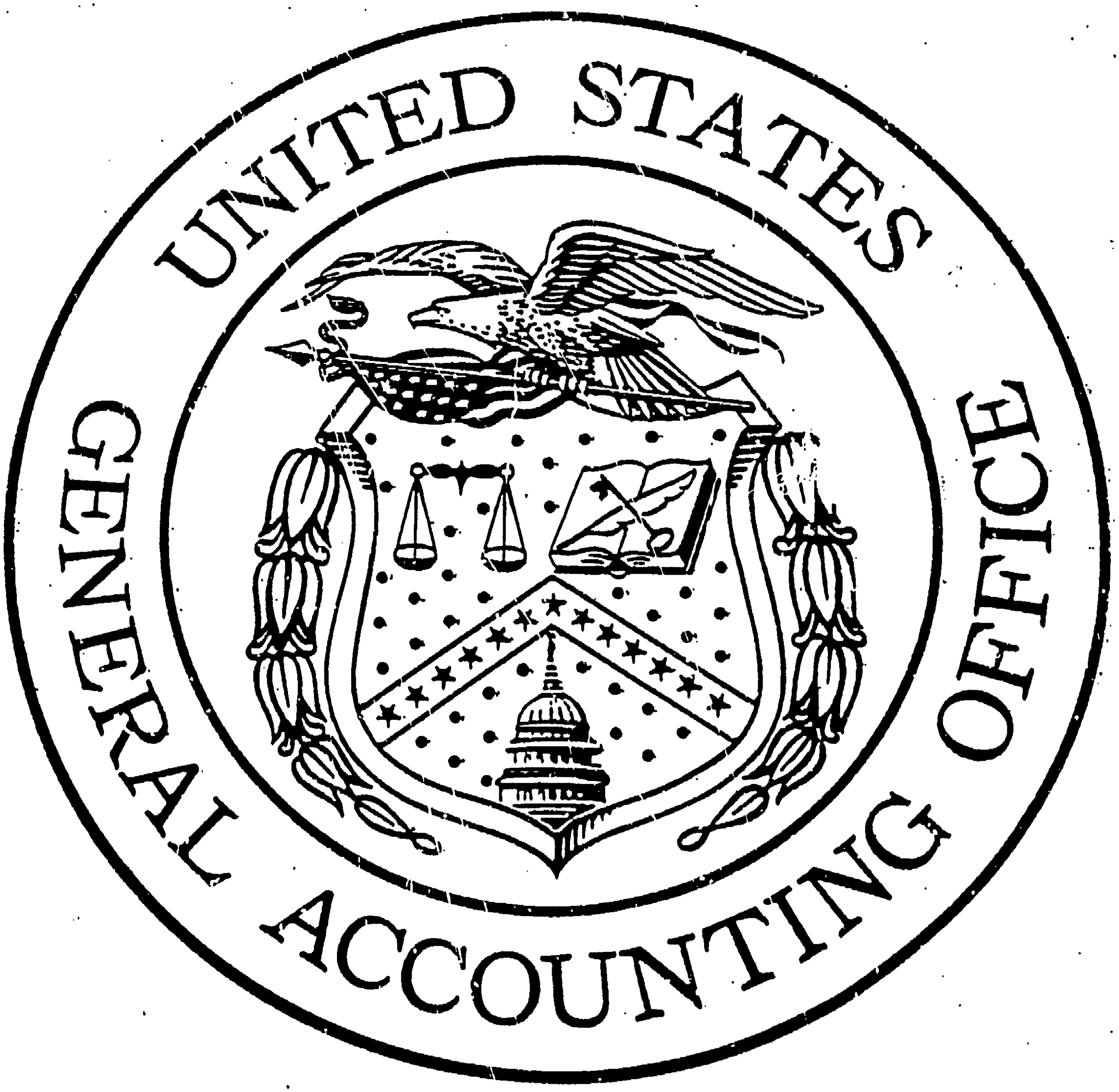
UNITED STATES
GENERAL ACCOUNTING OFFICE

11585

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

FILE: B-206209 DATE: June 4, 1982

MATTER OF: E-Systems, Inc.

DIGEST:

1. Buy American Act, as implemented by the Defense Acquisition Regulation, provides a preference for suppliers of domestic end products, but does not require that bidders offering foreign end products be rejected as nonresponsive.

2. Buy American Act is concerned with the place of manufacture, mining, or production, and not with the nationality of bidders. When determination and findings to waive the Act refers to items that are "produced" in a particular country, the waiver also will depend upon the place of production, not ownership or control of the firms bidding.

3. Decision to waive the Buy American Act is vested in the discretion of department heads.

4. While foreign bidders may enjoy competitive advantages because they are exempt from U.S. requirements concerning equal opportunity, environmental protection, and the like, there is no Federal law which seeks to equalize such competition.

5. GAO will not review arguments in bid protest that award to a foreign bidder will adversely affect U.S. industrial preparedness base in the absence of any statute or regulation requiring award to domestic bidders.

E-Systems, Inc. protests the Army's proposed award of a contract to an Israeli firm, Tadiran Israeli Electronics Industries, Inc., because, among other things, it allegedly would violate the Buy American Act, 41 U.S.C. § 10a-d (1976), and injure the U.S. industrial preparedness base. We deny the protest in part and dismiss the remainder.

The Communications-Electronics Command, Fort Monmouth, New Jersey, issued invitation for bids No. DAAB07-81-B-0206 on August 20, 1981; it covered domestic and foreign military sales requirements for receivers and receiver/transmitters for radio sets in a series designated AN/VRC 12, as well as related technical data. Of 46 firms solicited, three responded; at opening on January 15, 1982, their prices were as follows:

Tadiran Israel Electronics Industries, Ltd.	$38,994,797
E-Systems, Inc., Memcor Division	$46,976,944
Cincinnati Electronics Corporation	$64,864,491

E-Systems is the incumbent contractor for this equipment. Its first ground of protest is that the low bid should be considered nonresponsive because Tadiran is not offering a domestic end product,[1] as required by the Buy American Act. (The fact that Tadiran will produce the radio sets in Israel, with at least 50 percent foreign components, is not disputed.) The Act states that unless a department head determines that their purchase is inconsistent with the public interest or that their cost is unreasonable, domestic end products must be acquired for public use in the United States.

Alternatively, E-Systems argues that the Army should evaluate the low bid by adding a 50 percent differential to it, in accord with Defense Acquisition Regulation (DAR) § 6-104.4(b)(1) (Defense Acquisition Circular (DAC) No. 76-25,

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1/ Defined as an unmanufactured end product which has been mined or produced in the United States or an end product, manufactured in the United States, in which the cost of of its qualifying country components and its components which are mined, produced, or manufactured in the United States exceeds 50 percent of all its components. See DAR § 6-001.1(c) (DAC 76-25).

October 31, 1980). This would result in a total evaluated price of $58,492,195 for Tadiran, and would make E-Systems the low bidder.

The Army, however, has found Tadiran's bid responsive and has waived application of the 50 percent factor because of a 1979 Memorandum of Agreement between the U.S. and Israel which states that when certain listed defense services or supplies are to be provided, each country will evaluate offers from the other "without applying price differentials resulting from Buy National laws and regulations."

E-Systems argues that although Tadiran is incorporated and physically located in Israel, it does not qualify for the waiver because it is a subsidiary of General Telephone and Electronics (GTE) International. According to E-Systems, GTE owns 44 percent of Tadiran's voting stock and hence is in a position to control appointment of its general manager and managing director. Under these circumstances, E-Systems contends, Tadiran is a U.S. firm offering a foreign end product and must be evaluated accordingly.

E-Systems further argues that Tadiran's bid is either nonresponsive or ambiguous because the firm completed certifications regarding equal opportunity and affirmative action, clean air and water, and performance in a labor surplus area as "not applicable." E-Systems contends that the Army cannot enforce these requirements if Tadiran subcontracts in this country and cannot properly determine, after bid opening, whether Tadiran intends to require its subcontractors to comply, since completion of the certifications makes this a matter of responsiveness, not responsibility.

E-Systems also argues that Tadiran will be unable to comply with or will escape the cost of complying with numerous other mandatory contract clauses, including the wage and hour provisions of the Walsh-Healey Act; recovery of non-recurring costs in commercial sales; priorities, allocations, and allotments; pricing of adjustments; and affirmative action for disabled and Vietnam veterans and handicapped workers. E-Systems states that any foreign firm which is not subject to these socio-economic requirements gains an unfair competitive advantage and is, in effect, subsidized to the extent that it does not have to pay the cost of compliance. In addition, E-Systems argues that certain foreign military sales customers may refuse to accept Israeli products.

Finally, E-Systems argues that an award to Tadiran would injure the U.S. industrial preparedness base. E-Systems points out that the radio sets involved carry a No. 1 priority on the industrial preparedness planning list, and that E-Systems is both a planned producer and the only U.S. firm currently manufacturing this item. Contracts now being performed will be completed in 1983, the firm continues, and if E-Systems does not receive this award, start-up time and costs for it or any other U.S. manufacturer to begin production in the future will far outweigh any savings that might be realized by an award to Tadiran.

Once it became apparent that a foreign firm was the low bidder, E-Systems argues, the Secretary of Defense should have negotiated a contract with E-Systems under authority of 10 U.S.C. § 2304(a)(16), which permits such action in the interest of national defense or industrial mobilization.

The Army and Tadiran have submitted lengthy responses to this protest, invoking treaties and law review articles as well as numerous cases which they believe support their points of view. Generally, we agree that E-Systems' protest is without legal merit.

With regard to the Buy American Act, we note first that the Act, as implemented by the DAR, provides a preference for suppliers of domestic end products by requiring application of an evaluation factor[2] to offers of foreign end products from all but qualifying countries.[3] Neither the Act nor the regulation, however, requires that a bidder offering a foreign end product be rejected. See generally Air Plastics, Inc., 59 Comp. Gen. 678 (1980), 80-2 CPD 141.

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[2] The evaluation factor to be applied is 50 percent of the offer, excluding duty, or 6 percent of the offer, including duty, whichever is greater; in some instances, not present here, a 12 percent factor is to be applied. See DAR § 6-104.4 (b)(1).

[3] Qualifying countries are NATO nations and others with whom the U.S. has memorandums of understanding, defense cooperation agreements (such as that with Israel), or foreign military sale offset agreements. DAR § 6-001.5. The Secretary of Defense has determined that purchase of domestic end products would be either unreasonable as to cost or inconsistent with the public interest if the low evaluated bid results in the acquisition of foreign end products from a qualifying country. DAR § 6-104.4(a).

In describing the domestic end products which qualify for preference, the Act refers to articles, materials, and supplies which have been "mined, produced, or manufactured" in the U.S. We therefore have held that the Act is concerned with the place of manufacture (or mining or production) and not with the nationality of the bidder. Patterson Pump Company; Allis Chalmers Corporation, B-200165 and B-200165.2, December 31, 1980, 80-2 CPD 453.

To determine the legality of the Army's waiver of the evaluation factor, E-Systems would have us look only to the memorandum of agreement, set forth at DAR § 6-1504.1, which refers to the desire of the two countries to provide "Israeli sources" improved opportunities to compete for Department of Defense procurements. We need not interpret the memorandum of agreement, in our opinion, because the determination and findings (D&F) of the Secretary of Defense must be controlling. See Dosimeter Corporation of America, B-189733, July 14, 1978, 78-2 CPD 35. Here, the Secretary's determination is that it would be inconsistent with the public interest to apply the restrictions imposed by the Buy American Act to "items produced in Israel" which are listed in an attachment to the memorandum of agreement (emphasis added). The three line items involved in the protest are on that list.

We believe the language of the D&F confirms the Secretary's intent to have any waiver of the Buy American Act depend upon the place of manufacture or production; it is the only construction that is consistent with the Act itself. Further, we note that the DAR section on foreign acquisitions does not consider ownership or control in determining whether a firm is a domestic or foreign concern; rather, it depends upon incorporation and principal place of business. See DAR § 6-001.7 (DAC 76-08, July 15, 1981).

E-Systems' arguments with regard to the Act's policies favoring use of American materials and labor, which it believes will be adversely affected, ignore the fact that there are countervailing foreign policies expressed in the determination and findings, which states that the agreement "will help to ameliorate the imbalance in defense trade" between the U.S. and Israel. A decision to waive or not to waive the Buy American Act, we have stated, often requires balancing of such conflicting policies, but in any event is vested in the discretion of the Secretary. Dosimeter Corporation of America, supra; see also Self-Powered Lighting, Ltd., 59 Comp. Gen. 298 (1980), 80-1 CPD 195.

We also find E-Systems' second broad basis of protest--the fact that Tadiran completed certain certifications as "not applicable"--without legal merit. The first of the certifications complained about, K.13, Preference for Labor Surplus Area Concerns, states that the procurement is not set aside for such concerns, but that an offeror's status as a labor surplus area concern may affect its entitlement to award in case of a tie in evaluated offers. Tadiran, performing in Israel, obviously is not a labor surplus area concern and by not completing the certification it merely precluded consideration of itself as a labor surplus area concern.

Section K.19, Affirmative Action Compliance, and section K.20, Previous Contracts and Compliance Reports, require bidders to indicate whether they have developed and filed affirmative action programs or that they have not previously had contracts requiring such programs. In addition, if bidders have participated in previous contracts which were subject to equal opportunity clauses, they must indicate whether they have filed all required compliance reports. Section K.20 also requires bidders to represent that their proposed subcontractors will sign representations indicating submission of required compliance reports. However, the section specifically states that these representations "need not be submitted in connection with contracts or subcontracts which are exempt from the [equal opportunity] clause." Under DAR § 12-808(b) (DAC 76-20, September 17, 1979), contracts and subcontracts which are performed outside the United States, by employees who were not recruited within the United States, are exempt from equal opportunity requirements.

Section K.56, Clean Air and Water Certification, requires bidders to certify to three things: whether facilities to be utilized in performing the proposed contract are on the Environmental Protection Agency list of violating facilities; that the contracting officer will be notified of any notice of violation received before award; and that these same certifications will be included in every nonexempt subcontract. Under DAR § 1-2304.4(d) (1976 ed.), however, the requirements of the Clean Air Act and the Federal Water Pollution and Control Act do not apply to facilities located outside the United States.

We do not believe that Tadiran's insertion of "not applicable" is evidence of anything except its awareness of these exemptions, as applied to itself or to Israeli subcontractors. In its subcontracts with U.S. firms, it is bound by the general provisions of Section I of the solicitation, to which it has taken no exception. Section I.30 incorporates by reference DAR § 7-103.18(a), Equal Opportunity; under this clause, equal

opportunity provisions must be included in every nonexempt subcontract or purchase order, so that they will be binding upon each subcontractor or vendor. Section I.42 incorporates by reference DAR § 7-103.29, Clean Air and Water; under this clause, the contractor is required to insert the substance of the clean air and water provisions in any nonexempt contract. Thus, when read in its entirety we believe the Tadiran bid is neither ambiguous nor nonresponsive.

As for E-Systems' arguments that domestic bidders, who must comply with socio-economic requirements, are treated unequally, there is no Federal law which seeks to equalize the competitive advantage which a foreign firm may possess because it is exempt from these requirements. Fire & Technical Equipment Corp., B-203858, September 29, 1981, 81-2 CPD 266. Moreover, as Tadiran points out, it must comply with comparable Israeli laws and regulations, many of which may be equally as stringent as those in force here. Responding to similar arguments in Self-Powered Lighting, Ltd., v. United States, 492 F. Supp. 1267, 1274 (S.D. N.Y. 1980), the court found them "merely a veiled contention that none of the exceptions to the Buy American Act should ever be applied." Surely, the court concluded, this was not the Congress' intention when it authorized exceptions to the Buy American Act, or the Secretary's when he exercised one of those exceptions. We believe the same analysis is applicable here.

On the foreign military sales issue, the Army states that unless a customer specifies a particular source, its agreements generally permit the Army to determine the supplier of items to be provided. The Army states that there is no evidence that any foreign military sales customer will refuse or has reserved the right to refuse Israeli goods. In any event, this is not a matter involving the legality of the proposed award.

E-Systems further argues that the industrial preparedness base of the U.S. will be adversely affected by an award to Tadiran and that the Secretary of Defense should have negotiated with E-Systems upon finding that a foreign firm was the low bidder. (We note that for purposes of this argument, the protester considers Tadiran to be a foreign firm.) These arguments are not for our review.

The record includes a letter from the Deputy Secretary of Defense stating that the Army is conducting a complete review of the AN/VRC-12 industrial base. The Communications-Electronics

Command and the Materiel Development and Readiness Command unequivocally state that the award to Tadiran will not have an adverse effect on industrial preparedness. The two commands point out that these particular radio sets are not included on the list of defense items in DAR § 6-1405 (DAC 76-25) which must be obtained from domestic sources; moreover, they state, planning agreements with E-Systems and three other firms for this item have expired, although they are being renegotiated. Accordingly, there is no legal requirement which would restrict award of this contract to a U.S. firm.

To the extent that the protester believes such a requirement should exist, this is a matter for consideration by the Congress, not our Office. Our review of bid protests is limited to determining whether procuring agencies adhere to the policies and procedures prescribed by existing laws and regulations. See Hawaiian Dredging & Construction Company, a Dillingham Company; Gibbs & Hill, Inc., B-195101 and B-195101.2, April 8, 1980, 80-1 CPD 258, in which we rejected similar arguments that an award to a foreign firm per se would have a significant impact on U.S. energy policy. After the requirements of the Buy American Act have been satisfied--or if the foreign bidder qualifies for a waiver--so long as the foreign bidder remains low, is found responsible, and its bid is responsive, there are no further barriers to award. Fire & Technical Equipment Corp., supra.

The decision to negotiate under 10 U.S.C. § 2304(a)(16) should have been made, if at all, before the Army issued an unrestricted invitation for bids. E-Systems is untimely in objecting to the decision to advertise, since under our procedures, any protest on this basis should have been filed before bid opening. 4 C.F.R. § 21.2 (1981). We cannot accept E-Systems' alternate argument that the Army should have decided to negotiate with it--on a sole-source basis--when it became apparent that Tadiran was the low bidder. The integrity of the competitive bidding system is hardly served by the Government's issuing an open invitation and, after a foreign firm has entered and won the competition, determining that it should be excluded.

The protest is dismissed with regard to the industrial preparedness and negotiation issues, and denied as to the remainder.

Milton J. Socolar

for Comptroller General
of the United States

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