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DECISION



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

FILE: B-209607

DATE: May 24, 1983

MATTER OF: Canon USA, Inc.

DIGEST:

1. Letter objecting to agency's position and stating protester's view of proper way to evaluate bid, sent to agency within 10 working days of agency's statement of position, is a timely initial protest to agency. Subsequent protest to GAO, filed within 10 working days of receipt of letter from agency taking position adverse to initial protest, is also timely. Protest against agency's interpretation of solicitation is not a protest against alleged impropriety apparent in solicitation which must be filed prior to bid opening.
2. Regulations implementing multinational Agreement on Government Procurement (TIAS 10403) and Trade Agreements Act of 1979, Public Law 96-39, 19 U.S.C. § 2501, et seq. (1982), do not provide for elimination of duty from bids offering designated country end products. In view of these regulations, agency properly considered bid offering designated country end product on a duty-included basis. Letter associated with bid, confirming bidder's reliance on oral advice that bid would be evaluated duty-excluded, does not shift peril of relying on oral advice to Government so as to compel evaluation on duty-free basis.

Canon USA, Inc. (Canon), has filed a protest against the manner in which the Defense Logistics Agency (DLA) evaluated bids under invitation for bids (IFB) No. DLA400-82-B-5466 for microfiche viewers/printers. Canon contends that its bid should have been considered on a duty-excluded basis, which would have made it the low bid. We deny the protest.

This solicitation sought bids on a requirements-type contract to supply microfiche equipment for approximately an 18-month period. Bidders were asked to submit their bids on

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both FOB origin and FOB destination bases. Clause H36 of the IFB, entitled "BUY AMERICAN ACT, TRADE AGREEMENTS ACT, AND BALANCE OF PAYMENTS PROGRAM," provided that offers based on supplying foreign end products would be evaluated in accordance with section VI of the Defense Acquisition Regulation (DAR). Clause K10 of the IFB required bidders offering foreign items to include in their offered prices all applicable duty and, for evaluation purposes, to indicate the amount of duty included in each offered item. Subsection (c) of clause K10 stated that "The Government reserves the right to award on a duty-free basis by reducing the unit price offered by the amount of the duty." Section "M" of the IFB, "Evaluation of Bids," states that "Award will be made on the basis of the lowest overall cost of purchasing and using microfiche viewer-printer as determined by the Government."

On September 7, 1982, 3 days prior to the scheduled date of the bid opening, Canon contacted DLA and inquired whether its bid would be evaluated on a duty-included or -excluded basis. Canon was advised that its bid would be evaluated on a duty-excluded basis. Canon confirmed this conversation in a letter dated September 7, 1982, which was associated with Canon's bid at bid opening. Canon proposed to furnish a designated country end product with 80-percent foreign content at a unit price of \$798, FOB origin, Yokohama, Japan. In item K10, Canon identified the amount of applicable duty as \$30.06 per unit.

On September 20, 1982, Canon advised the contracting officer that, based on its own review of the bids, Canon's FOB origin bid was the lowest bid received and requested the contracting officer's confirmation prior to the award of the contract to any other bidder. In a letter dated October 7, 1982, to Canon, the contracting officer stated that duty would not be excluded from Canon's bid. In a letter also dated October 7, 1982, Canon's counsel referred to prior discussions with DLA and stated that clause K10 required Canon to include duty in its bid and that such duty should have been deducted from Canon's bid for evaluation purposes. Canon received DLA's letter on October 12, 1982, and filed its protest with our Office on October 25, 1982, 10 working days later.

Canon contends that: (1) its FOB origin bid included the amount of applicable import duty as required by clause K10; (2) the IFB required that this amount be deducted from Canon's FOB origin bid in the evaluation of bids; and (3) the Government was on actual notice of Canon's understanding of the IFB and, therefore, must evaluate Canon's bid on a duty-excluded basis.

DLA contends that Canon's protest is untimely under our Bid Protest Procedures, 4 C.F.R. part 21 (1983), and asserts that, in any event, DLA evaluated Canon's bid properly. DLA states that under an FOB origin bid, the Government or the importer, and not the bidder, is liable for any duty and, therefore, Canon should not have included any duty in its origin bid, since none was applicable.

DLA also contends that Canon's protest is untimely because it was not filed prior to the bid opening date. In this respect, our Bid Protest Procedures, 4 C.F.R. part 21 (1983), require that protests against alleged improprieties apparent in an IFB be filed prior to the date set for bid opening. DLA asserts that the only reason for Canon to request clarification of clause K10 prior to bid opening was that Canon found the clause to be ambiguous. On this basis, DLA suggests that Canon's protest is a challenge to an impropriety apparent on the face of the solicitation which should have been filed prior to the bid opening date. We disagree.

In our opinion, Canon did not have a basis for protest until DLA, after bid opening, advised Canon that duty would not be deducted from Canon's bid and communicated that determination to Canon. Consequently, Canon's protest is against DLA's post-bid-opening interpretation of the solicitation rather than an impropriety apparent on the face of the solicitation.

DLA also asserts that Canon's protest is untimely on the basis that it was not filed within 10 working days of when Canon first learned that DLA was not going to subtract duty from Canon's bid. (Section 21.2(b)(2) of our Procedures requires that protests, other than those against improprieties apparent in a solicitation, be filed within 10 working days of when the protester learned of the basis for its protest.) In support of this contention, DLA points to that portion of the letter to DLA from Canon's counsel of

October 7, 1982, cited above, in which counsel referred to prior discussions. DLA asserts that these "prior discussions" relate back at least to a meeting on September 27, 1982, in which DLA took the position that it would not subtract duty from Canon's bid and which was more than 10 working days prior to the date on which Canon filed its protest with our Office.

In our opinion, DLA's position ignores the overall importance of Canon's letter of October 7. In this document, Canon's counsel both expresses disagreement with DLA's position and states Canon's own position. In our view, this is sufficient to consider this letter an initial protest to the agency which was filed within 10 working days of the September 27 meeting, the first occasion on which DLA took a firm position on the evaluation of Canon's bid. Consequently, we view this letter as a timely initial protest to DLA. Moreover, we think that Canon was correct in considering the contracting officer's letter of October 7, received on October 12, as DLA's initial adverse action on Canon's protest to DLA. We therefore regard Canon's protest to our Office, filed within 10 working days of Canon's receipt of this letter, to be timely. See 4 C.F.R. § 21.2(a) (1983).

Initially, we agree with Canon that clause K10 required it to include duty in its FOB origin bid and find DLA's suggestion to the contrary to be without merit. Clause K10, paraphrased, states: (a) include all applicable duty; (b) state how much duty is included; and (c) DLA may award the contract on a duty-free basis at the offered price less the amount of included duty. In our view, whether duty is "applicable" is determined by whether the offered product is normally subject to duty under the Tariff Schedules of the United States, 19 U.S.C. 1202 (1976), without regard to whether delivery is offered FOB origin or destination, since the item is subject to duty in either event (even when the Government is the importer) unless the agency has claimed duty-free entry in accordance with the regulations. See DAR §§ 6-601, et seq. (Defense Acquisition Circular No. 76-25, October 31, 1980); 19 C.F.R. § 10.100, et seq. (1982). Absent anything in the solicitation clearly stating that DLA would award the contract on a duty-free basis, Canon therefore was required to include duty in its bid.

The balance of Canon's protest is based upon its interpretation of DAR § 6-1602(a) requiring that offers of eligible products from designated countries be evaluated without regard to restrictions imposed by the Buy American Act. As noted above, the IFB specified that bids offering foreign end products would be evaluated in accordance with the provisions of DAR section 6. The acquisition of designated country end products is covered by DAR § 6-1600 (OLA CONTRLTR 81-2, January 19, 1981), which implements the Multinational Agreement on Government Procurement (TIAS 10403) and the Trade Agreements Act of 1979, Public Law 96-39, 19 U.S.C. § 2501, et seq. (1982). Part II of the Agreement on Government Procurement provides that:

"1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, parties to this Agreement shall provide immediately and unconditionally to the products and suppliers of other parties offering products originating within the customs territories (including free zones) of the parties to this Agreement treatment no less favorable than:

"(a) that accorded to domestic products and suppliers; and

"(b) that accorded to products and suppliers of any other party.

"2. The provisions of paragraph 1 shall not apply to customs duties and charges of any kind imposed in connection with importation, the method of levying such duties and charges, and other import regulations and formalities."

These principles are carried through to the implementing regulations, cited by Canon, which provide for designated country end products to be evaluated "without regard to restrictions of the Buy American Act and Balance of Payments Program for such product," DAR § 6-1602(a), supra, but which, consistent with paragraph 2, above, does not provide for the elimination of duty in the evaluation of such bids. This is to be contrasted with the evaluation of bids from

NATO Participating Country Sources (see DAR § 6-1403.1(c)(4) (Defense Acquisition Circular No. 76-25, October 31, 1980)), which specifically excludes duty from the evaluation of such bids.

Since bids were to be evaluated under these regulations, we find that it was proper for DLA to evaluate Canon's bid without deduction of the stated duty.

Canon's "confirming letter" does not compel a different result. The IFB incorporated the provisions of standard form 33, which states in part that "oral explanations or instructions given before award of a contract will not be binding." We have held that bidders rely on such advice at their peril, BlueRidge Security Guard Service, Inc., B-208605.2, November 22, 1982, 82-2 CPD 464, and we agree with DLA that bidders cannot shift this risk to the Government simply by submitting a confirming letter.

The protest is denied.

for Harry R. Van Cleave
Comptroller General
of the United States