

DECISION



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

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FILE: B-209458; B-209458.2;
B-209458.3

DATE: September 2, 1983

MATTER OF:

The R. H. Pines Corporation;
Northwest Pipe & Casing Co.;
G. Shiposh Engineering Works, Ltd.

DIGEST:

1. GAO finds that there is no legal impediment to Department of Defense (DOD) now reconsidering its determination not to waive Balance of Payments Program evaluation factor for low bidder--Israeli firm--since waiver was denied due to advice of United States Trade Representative (USTR) perceived by DOD to preclude waiver, the USTR advises that DOD perception of that advice did not preclude waiver, and the procurement is preaward and corrective action is possible.
2. Despite low foreign bidder's references to domestic ports of loading, for evaluation purposes specific reference to foreign port as shipping point is accepted as only reasonable interpretation of bid. Therefore, bid is unambiguous and responsive.
3. The designation of foreign manufacturing facilities concerns bidder responsibility. Since GAO does not review a contracting officer's affirmative determination of responsibility, except in circumstances not present here, it will not consider this contention.
4. Protest of award to firm "A" is dismissed where court is considering propriety of award to firm "B," and if court rules against firm "B" making firm "A" eligible for award, protester is not interested party because there are other possible awardees priced lower than protester.

The R. H. Pines Corporation (Pines) protests any award by the Defense Construction Supply Center of the Defense Logistics Agency (DLA) to G. Shiposh Engineering Works,

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Ltd. (Shiposh), under invitation for bids (IFB) No. DLA700-82-B-2029. Pines contends that Shiposh, an Israeli firm, is not the low bidder due to the 50-percent Balance of Payments Program (BoPP) evaluation factor added to foreign bids, and that the Shiposh bid is nonresponsive.

Northwest Pipe & Casing Co. (Northwest) protests any award to Pines.

Shiposh protests DLA's failure to award it the contract. While these protests were pending with our Office, Shiposh filed suit against the Government in the United States Claims Court in Washington, D.C. (Civil Action No. 516-83C). The bases for Shiposh's suit are substantially the same as those raised in its protest. On August 11, 1983, the court issued a "Call Order," requesting an opinion from this Office.

We sustain the Shiposh protest, deny the Pines protest, and dismiss the Northwest protest.

The IFB, which included a labor surplus area (LSA) preference, was issued on July 8, 1982, for steel tube for delivery f.o.b. origin. Bids were opened on September 14, 1982, and eight bids were received. Shiposh submitted the low bid (\$1,680,896.25), Pines was the second low bidder (\$2,615,286.80), and Northwest was the sixth low bidder.

After transportation costs to the f.o.b. origin prices and the non-LSA differential were added to Shiposh's bid, Shiposh remained the low evaluated bidder with Pines second low. On October 6, 1982, DLA requested a waiver of the BoPP differential for Shiposh from the Under Secretary of Defense for Research and Engineering pursuant to a Memorandum of Agreement between the United States and Israel. Absent this waiver, the BoPP differential is applied, and the Shiposh bid is not low.

On October 12, 1982, Pines protested to GAO, arguing that Shiposh's bid was ambiguous with respect to the f.o.b. origin point and, therefore, was nonresponsive. Further, Pines contended that Shiposh's failure to state the location of its production facilities as required by the solicitation also rendered the bid nonresponsive.

DLA argued that the bid was responsive and recommended that GAO deny the protest. DLA also advised that it expected that a waiver of the BoPP differential would be

approved. However, DLA subsequently advised GAO that the Under Secretary of Defense, by memorandum of December 22, 1982, had denied the waiver because Israel had not signed the Agreement on Government Procurement, General Agreement on Tariffs and Trade (Agreement), and the Trade Agreements Act of 1979 (Act), 19 U.S.C. § 2501, et seq. (Supp. IV, 1980), as implemented, prohibits, as of January 1, 1983, United States Government procurements of products from countries which have not signed the Agreement.

The Under Secretary had consulted with the United States Trade Representative (USTR), who has been delegated various functions under the Act specifically with respect to the Agreement. Executive Order No. 12260, 46 Fed. Reg. 1653 (1980); USTR Determination Regarding Application of Agreement on Government Procurement and Waiver of Discriminatory Purchasing Requirements, 46 Fed. Reg. 16 (1981). The act, Agreement, Determination, and implementing Defense Acquisition Regulation § (DAR) 6-1600 (1976 ed.) provide for waiver of the BoPP differential for products of countries signatory to the Agreement.

Israel signed the Agreement on May 26, 1983. DLA had stated that the contract could be awarded to Shiposh if Israel became a party to the Agreement. Thus, the failure of Israel to sign the Agreement, the reason that the BoPP waiver was denied, appeared no longer to be an impediment to an award to Shiposh.

However, on July 6, 1983, the USTR published in the Federal Register a formal notice that Israel had become a party to the Agreement and that, pursuant to the act, Israel was designated an eligible country. In this notice, the designation is made effective "as to contracts awarded on the basis of solicitations for which the closing date for bids or proposals is on or after June 29, 1983," and we note that bid opening for this procurement occurred in September 1982.

The USTR advises that the July 6, 1983 determination concerning the effect of Israel's signing of the Agreement is consistent with United States law and the Agreement and was proper under its delegation of authority. The USTR argues that questions raised regarding this determination are not relevant in deciding this bid protest, and states:

** * * the Comptroller General's consideration on this point should be confined to the issue of whether the Defense Department acted properly in denying a waiver of the Buy America Act/Balance of Payments Program * * *

The USTR points out that it did not determine that a BoPP waiver for Shiposh should not be granted by the Department of Defense (DOD) because award of the contract would occur after January 1, 1983. The USTR states that only DOD could and did make the determination not to waive the BoPP. The reason for USTR's advice to DOD not to waive the BoPP in this case was that the USTR believed it would be inappropriate to, in essence, afford the benefit of the Agreement to a country which was not a party thereto. The prospective applicability of the prohibition was not a factor. The USTR comments indicate to us that the USTR did not intend to convey to DOD that DOD should prospectively apply the act's prohibition. Also, the USTR implies that the act was not an impediment to award prior to January 1, 1983, and that the decision to waive was within DOD's sole discretion.

Based on this record, we find that DOD construed the USTR views differently, and the USTR's consultations with DOD officials was the paramount factor in DOD's decision not to waive the BoPP prior to January 1, 1983. It is clear that the Under Secretary of Defense, in denying the waiver, relied substantially on the USTR's advice that Israel had not signed the Agreement, and that the USTR advocated prospective application of the act's prohibition. The USTR has advised this was not the case, and the Under Secretary has stated that absent the USTR's advice, DOD ordinarily would have agreed to waive the BoPP for Shiposh's bid. The contract has not been awarded. Further, the USTR does not suggest that there is any legal impediment to DOD now making a decision to waive for this contract if conditions prior to January 1, 1983, permitted a waiver. Therefore, we perceive no legal impediment to DOD now considering whether Shiposh is entitled to a waiver.

We will now discuss the Pines protest regarding the responsiveness of the Shiposh bid. The IFB solicited bids for steel tube, "F.O.B. ORIGIN-FOR SHIPMENT TO: PORT OF LOADING SEE PROV-K20." Provision K-20 provides for domestic origin bids to be evaluated for transportation costs to

specified ports of loading (Bayonne, New Jersey, or Norfolk, Virginia) plus ocean shipping costs to an overseas destination (unidentified but designated as "HA8," which is in England). Provision M-16 advised bidders that, notwithstanding provision K-20, bidders furnishing foreign end products must submit bids on the basis of "delivery F.O.B. Port of Loading of country of origin" and required that the bidder designate the foreign port of loading. These foreign bids are evaluated for ocean shipping costs from the designated foreign port of loading to the overseas destination (HA8).

Shiposh's low bid was initially communicated by telex on August 21, 1982. The telex contained the following language:

"FOB ORIGIN - FOR SHIPMENT TO PORT OF
LOADING TO BE UNDERSTOOD FOB DESTINATION:
BAYONNE, NJ NORFOLK, VA"

"PRICES TO BE UNDERSTOOD FOB PORT OF
LOADING: DESTINATION PORT: NJ NORFOLK, VA"

"SHIPPING POINT: HAIFA BAY ISRAEL"

The telex further advised that the quotation was subject to all the terms, conditions and provisions of the solicitation.

On its hard copy bid, Shiposh, in provision M-16, designated "HAIFA BAY, ISRAEL," as its "port of loading of country of origin." Shiposh also typed in "Bayonne, New Jersey & Norfolk, Virginia" under provision M-12, which was not marked with an "X" as being applicable to the IFB. This provision requested bidders to specify a delivery point for foreign-manufactured items shipped from locations outside the United States to consignees within the United States.

Pines contends that Shiposh's bid was ambiguous in that the f.o.b. point for evaluation purposes is unclear, since the bid refers, alternatively, to Norfolk, Bayonne and Haifa Bay. Further, it is alleged that Shiposh's designation of "Haifa Bay, Israel," as the port of loading was ambiguous since Haifa Bay is an area, not a port.

DLA asserts that Shiposh's bid is not ambiguous and rejects Pines' view that Shiposh's bid indicates origin

points in the United States. DLA points out that Shiposh's references to the two domestic ports were inserted under a clause that was inapplicable to the IFB because the ultimate consignee was not in the United States. Since this clause is not applicable, DLA argues that it is reasonable to disregard the Bayonne and Norfolk references and, thus, apply transportation costs from Haifa Bay, Israel, which is listed as the port of loading and shipping point. DLA further points out that Shiposh is the lowest bidder by a substantial amount whether the bid is evaluated on the basis of shipment from Haifa Bay, Norfolk, or Bayonne. In this regard, we note that the DLA evaluation of Shiposh's transportation cost is \$420,410.96 from Norfolk and \$507,753.08 from Haifa Bay. Our calculations show that Shiposh is low by about \$550,000 from Haifa Bay and \$460,000 from Norfolk (Bayonne is about the same) compared to Pines' f.o.b. origin bid. (Pines also submitted a destination bid \$61,000 higher than its origin bid, based on its specific knowledge of the destination point.)

In the alternative, DLA refers to our decisions which hold that if a bid is subject to two reasonable interpretations, the bid is the low bid under either interpretation, and the bidder agrees to accept the lowest price, the ambiguous bid can be accepted. See, for example, Polycast Technology Corporation, B-203871, November 2, 1981, 81-2 CPD 373. Thus, DLA would accept Shiposh's bid, since it is the low bid under any of the origin points which the parties contend could have been intended under the bid. In rebuttal to this argument, Pines states that Shiposh should be required to deliver its product to Bayonne or Norfolk since the transportation costs from those ports rather than from Haifa Bay are more advantageous to the Government.

We conclude that the bid is not ambiguous. Admittedly, the Shiposh references to the domestic ports of loading are not readily explainable. Shiposh could have been submitting a bid covering all origin point possibilities, or was offering to ship the items from Israel to those domestic ports. We can understand the possible confusion from Shiposh's standpoint because, apparently unlike Pines, the unidentified actual destination was not known to Shiposh. While these are possible theoretical interpretations, we do not find them to be reasonable in the circumstances.

In our view, the only reasonable reading of Shiposh's bid is that the bid was for the delivery f.o.b. Haifa Bay

Israel, the designated foreign port of loading. There are repeated references to Haifa Bay--the most significant being under clause M-16, which is the only IFB clause directly applicable to Shiposh, that is a foreign firm offering a product manufactured outside the United States for delivery to a destination outside the United States. In our view, Shiposh's mention of Bayonne and Norfolk as domestic origin points in the inapplicable clause M-12 and in the telex is considered to be gratuitous and of no legal effect. Provision M-12 involves foreign offers to consignees within the United States, and provision K-20 applies only to domestic offers. Keeping in mind that the ultimate overseas destination was unidentified and the domestic ports were only for evaluation purposes, it is unreasonable for the Government to evaluate the bid from domestic ports of loading when the actual destination was at some point where delivery from those domestic ports was impracticable and unnecessary.

In any event, assuming that the bid is ambiguous because more than one f.o.b. origin point was designated, it is significant to note that all of the origin points are responsive to the Government's stated requirements. Further, in B-155429, November 23, 1964, a case in which an f.o.b. point of origin was not explicitly designated, in finding the bid responsive, we considered significant the fact that the bid was so low that the cost of transportation from any point of origin could not change the bidder's standing as low bidder. Under any of the locations which Pines argues are designated by Shiposh (including any port at Haifa Bay), Shiposh remains the low bidder by a significant margin. We find that no purpose would be served by requiring Shiposh to ship its products to the United States, rather than from Israel, for eventual Government shipment to England when the \$90,000 savings in transportation costs has little impact on the overall cost to the Government for the products themselves. Therefore, we have no basis to find the Shiposh bid nonresponsive.

Pines' allegation that Shiposh's bid is also nonresponsive for failure to designate the location of its production plant under the IFB is denied. We have held that the designation of the place of production is a matter of responsibility, not responsiveness; General Instrument Corporation Lamp Division, B-205261; B-205261.2, March 1, 1982, 82-1 CPD 177; Keco Industries, Inc., B-199934, September 22, 1980, 80-2 CPD 219. The award of a contract

to Shiposh would necessarily require a finding that the awardee is responsible. DAR § 1-902 (1976 ed.); B.H. Aircraft Company, Inc., B-210798, April 1, 1983, 83-1 CPD 344.

With regard to Northwest's protest against Pines, we dismiss it since the issue before the court is the propriety of the award to Shiposh. In the event the court rules against Shiposh and Pines is in line for award we still would not consider the Northwest protest against Pines. This is because Northwest, the sixth low bidder, has not protested awards to lower bidders apparently eligible for award if Pines is not; therefore, Northwest would not be an interested party under our Bid Protest Procedures. See Nicolet Analytical Instruments, B-210851, April 26, 1983, 83-1 CPD 456.

We sustain Shiposh's protest, we deny Pines' protest, and we dismiss Northwest's protest.

for *Harry D. Van Cleave*
Comptroller General
of the United States