

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

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FILE: B-212873**DATE:** February 9, 1984**MATTER OF:** Mercer Electronics Company**DIGEST:**

GAO concludes that initial basis for protest is abandoned and will not be considered. Contention that protester should have been granted waiver from prohibition against purchase of nondesignated or nonqualifying country end products under title III of Trade Agreements Act of 1979, 19 U.S.C. § 2511, et seq., is untimely because not filed within 10 working days of when protester should have known of basis for protest.

Mercer Electronics Company (Mercer) protests the rejection of its bid under invitation for bids (IFB) No. DLA900-83-B-1509 issued by the Defense Logistics Agency (DLA). We dismiss the protest.

This solicitation is for the acquisition of multimeters, a type of electronics test equipment. Multimeters are included among eligible products under title III of the Trade Agreements Act of 1979, 19 U.S.C. 2511, et seq. (1982), implementing the Agreement on Government Procurement negotiated during the Tokyo Round of Multilateral Trade Negotiations.

Title III of the Trade Agreements Act, supra, authorizes the President to waive all buy national laws, regulations or procedures for the acquisition of eligible products from those countries or instrumentalities which the President has designated as countries or instrumentalities meeting the criteria of 19 U.S.C. § 2511(b) by being signatory to the agreement, providing reciprocity, or by being a least developed country. In order to encourage additional countries to become parties to the Agreement and to provide for reciprocal competitive government procurement opportunities for United States products, the act also requires the President to prohibit the procurement of products from foreign countries which were not designated under the act, 19 U.S.C. § 2512(a), but permits the President to authorize agency heads to waive, subject to certain restrictions and

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policy guidance, the prohibition on a case-by-case basis when in the national interest.

Regulations implementing the act within the Department of Defense are contained in Defense Acquisition Regulation § 6-1600. A new § 6-1602(b), effective for all contract awards after January 1, 1983, prohibits the purchase of foreign end products, subject to the national interest exception to which we referred above, which are from neither designated countries nor qualifying countries--such as NATO countries with which the Department of Defense has reciprocal defense procurement agreements. DLA CONTR-LTR 82-34, December 29, 1982.

Mercer submitted the low bid in this procurement, offering to supply a multimeter produced in Korea. In its bid, Mercer certified its multimeter as a qualifying country end product although Korea is neither a designated country nor a qualifying country. DLA did not immediately notice this discrepancy and, prior to award, inquired whether Mercer could arrange expedited delivery of the multimeters to fulfill an urgent requirement. Mercer, still before award, confirmed its ability to accelerate deliveries in a message to DLA. Shortly thereafter, DLA officials discovered Mercer's erroneous designation of its multimeters as qualifying country end products. On the basis of this information, the contracting officer determined that award of the contract to Mercer was prohibited. The contract was awarded to the second low bidder. The contracting officer advised Mercer of the reasons for the rejection of its bid in a letter dated August 19, 1983, which also cited the applicable regulations, solicitation provisions, and the Trade Agreements Act of 1979, supra.

Mercer initially filed a timely protest with our Office alleging that the rejection of its bid was improper because Korea was a country specifically qualified under the General System of Preferences established in the Trade Act of 1974, 19 U.S.C. § 2101, et seq. (1982). DLA's response was to point out that the governing act was the Trade Agreements Act of 1979 which, as implemented, prohibited the purchase of end products from nondesignated or nonqualifying countries, such as Korea.

On October 25, 1983, Mercer answered DLA's position by arguing that DLA should have granted a waiver for Mercer's bid under the national interest exception to the Trade Agreements Act prohibition, referred to above. DLA contends that Mercer has abandoned its initial protest and asserts that Mercer's latter argument is untimely under our Bid Protest Procedures, 4 C.F.R. § 21 (1983), because it was not filed within 10 working days of when Mercer knew or should have known of this basis for protest.

We agree with DLA.

It is clear that Mercer's protest is governed by the Trade Agreements Act of 1979, supra, as provided in the solicitation. Mercer has offered neither further argument nor evidence in support of its initial position concerning applicability of the Trade Agreements Act of 1974. We therefore concur in DLA's position that Mercer has abandoned this basis for protest and will not consider it further.

Mercer's second basis of protest--that DLA should have granted it a waiver under the national interest exception--is untimely. At the latest, Mercer should have recognized this basis for protest when it received DLA's letter of August 19, 1983, which specifically cited the applicable law and regulations. Mercer did not raise this objection until October 25, 1983, substantially more than 10 working days after it should have known of this basis for protest. This contention, therefore, is untimely and not for consideration. 4 C.F.R. § 21.2(b) (1983).

The protest is dismissed.

Harry R. Van Cleve
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Acting General Counsel