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DECISION



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

FILE: B-218306 **DATE:** May 24, 1985
MATTER OF: Tritan Corporation

DIGEST:

1. Allegations that a firm is not eligible to compete on a small business set-aside procurement because it is affiliated with a foreign firm and will supply foreign products must be reviewed by the Small Business Administration, which is empowered to make conclusive determinations of size status.
2. The Buy American Act does not prohibit bidding by foreign entities or the procurement of foreign products, but merely establishes a preference evaluation system for domestic goods.
3. Untimely issues will not be considered where they neither present unique issues of first impression nor involve questions whose resolution would benefit parties other than the protester.

Tritan Corporation protests the Department of the Navy's contract award for water blasters to Harben, Inc., under request for proposals (RFP) No. N00140-84-R-0071, a total small business set-aside. We dismiss the protest.

Tritan initially protested the rejection of its proposal in Tritan Corp., B-216994, Nov. 27, 1984, 84-2 CPD ¶ 579. We denied that protest because Tritan had not met its burden of proving its allegation that Tritan's initial status as low offeror was announced to its competitors, thereby prejudicing Tritan when the date for proposals was extended and it revised its price upward. Tritan requested reconsideration of that decision in Tritan Corp.--Reconsideration, B-216994.2, Feb. 4, 1985, 85-1 CPD ¶ 136, elaborating on the same facts stated in the original protest and further challenging the Navy's affirmative

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determination of Harben's responsibility and negative determination of Tritan's responsibility. The reconsideration request was denied because 1) Tritan did not specify any new facts or legal arguments which were not considered previously by this Office, 2) in general we will not review affirmative determinations of responsibility, and 3) the propriety of the negative responsibility determination was academic since Tritan was no longer in line for award.

Tritan's protest, in part, again raises substantially the same issues as it has raised before and, in essence, requests a second reconsideration of its original protest. Those issues concern our review of determinations of bidder responsibility and improper Navy conduct in allegedly pressuring Tritan to increase its bid. However, as we stated in our decision in B-216994.2, supra, a request for reconsideration must specify any errors of law or any information not considered by GAO in the initial decision. See GAO Bid Protest Regulations, 4 C.F.R. § 21.12(a) (1985). Tritan has not done so here. Therefore, we will not consider these issues again.

Tritan also alleges for the first time that 1) Harben is a subsidiary of a foreign-owned (British) corporation and, as such, is ineligible to compete with United States domestic small businesses under a small business set-aside procurement, 2) the Navy improperly issued specifications for the procurement of, and then purchased, a foreign (German) product, and 3) Harben submitted false information in, and deceptively omitted certain information from, its bid.

Regarding the protester's assertion that Harben is ineligible for award because of its alleged foreign affiliation, we note that a size status protest was filed at the Small Business Administration (SBA) by the contracting officer. The basis for the protest was that a preaward survey indicated that Harben might have a parent company relationship that could jeopardize its size status. Harben was certified as small, notwithstanding the SBA's recognition of Harben's affiliation with Harben Systems Ltd. of Wiltshire, England, a foreign company. This certification is conclusive as to size status and, consequently, as to Harben's eligibility for award. Beta Construction Co., B-216176, Dec. 11, 1984, 84-2 CPD ¶ 648. Similarly, Tritan's challenge to Harben's eligibility for award on the ground that the firm is offering foreign

products or items with foreign components is a matter for resolution by the SBA, rather than this Office. Committee of Domestic Steel Wire Rope and Specialty Cable Manufacturers--Reconsideration, B-208801.2, Nov. 16, 1982, 82-2 CPD ¶ 448. Therefore, we will not review these matters.

To the extent that Tritan is alleging a violation of the Buy American Act, 41 U.S.C. §10(a)-(d) (1982), we note that the act does not prohibit, as Tritan implies, agency procurement of foreign end products, nor does it require the disqualification of a bidder who offers a foreign end product. Rather, the act and its implementing regulations provide a preference for domestic items which is established through the use of an evaluation differential added to the price of the foreign item. Autoclave Engineers, Inc., B-217212, Dec. 14, 1984, 84-2 CPD ¶ 668. Furthermore, we note that Harben certified in its offer that only approximately 49 percent of the proposed contract price represents foreign content or effort.^{1/} Whether the end products actually supplied by Harben comply with this certification is a matter of contract administration, which we will not review. See Autoclave Engineers, Inc., B-217212, supra; 4 C.F.R. § 21.3(f)(1) (1985).

Tritan's complaint that the Navy improperly issued specifications requiring the use of a German diesel engine is untimely. A protest which is based on alleged solicitation improprieties which are apparent on the face of the solicitation, as is the case here, must be filed prior to the closing date for the receipt of initial proposals. See GAO Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985). The closing date for the receipt of initial proposals in this procurement was February 24, 1984, and Tritan's March 11, 1985, protest of this issue is, therefore, untimely.

Tritan also alleges that it did not receive timely preaward notice of the award to Harben and therefore that it was precluded from timely protesting Harben's size status to the SBA. We find this ground of protest untimely. Our Bid Protest Regulations provide that a protest, the basis of which is not apparent on face of the solicitation, must be filed within-10 working days after

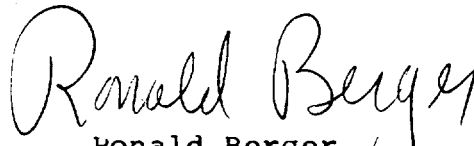
^{1/} In order to be considered a domestic end product for Buy American Act purposes, the cost of an item's components which are mined, produced or manufactured in the United States must exceed 50 percent of the cost of all its components. Fordice Construction Co., B-206633, Apr. 30, 1982, 82-1 CPD ¶ 401.

the basis of protest is, or should have been, known. 4 C.F.R. § 21.2(a)(2). Tritan should have been on notice of this basis of protest no later than the date it learned of the award to Harben. Contract award was made on December 21, 1984, and the postaward notice was dated December 26, 1984. Accordingly, the instant protest, having been filed on March 11, 1985, is untimely.

The protester asks that these matters be exempted from our timeliness rules on the basis that they involve issues significant to the procurement system. See 4 C.F.R. § 21.2(c). The significant issue exception to our timeliness rules is used sparingly, so that the rules do not become meaningless, and is limited to issues of widespread importance to the procurement community which have not been considered on the merits in our previous decisions. California Aero Dynamics Corp.--Request for Reconsideration, B-216501.2, Dec. 6, 1984, 84-2 CPD ¶ 635. We do not find Tritan's untimely issues to be significant within the meaning of 4 C.F.R. § 21.2(c), as they do not present unique issues of first impression, nor do they involve questions whose resolution would benefit parties other than the protester. Universal Design Systems, Inc.--Reconsideration, B-211547.3, Aug. 16, 1983, 83-2 CPD ¶ 220.

Tritan's allegations that Harben submitted false information or deceptively omitted certain information from its bid concern possible violations of criminal law, which are outside the scope of our bid protest function and should be referred to the Department of Justice. ^{2/}E.C. Campbell, Inc., B-204253, Feb. 2, 1982, 82-1 CPD ¶ 76.

The protest is dismissed.


 Ronald Berger
 Deputy Associate
 General Counsel

^{2/} Tritan has stated that it has already filed a complaint with federal criminal authorities regarding this matter.