31802

DECISION

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

FILE: B-218884.2 **DATE:** July 26, 1985

MATTER OF: Penthouse Manufacturing Co., Inc.--Reconsideration

DIGEST:

1. Regulation defining the term "domestic end product" for purposes of the Buy American Act is not applicable to appropriation act requirement that agency only purchase clothing that is of domestic origin and manufacture.

2. Requirement that clause providing for reports on the use of foreign subcontractors be included in all contracts expected to exceed $500,000 does not conflict with clause in specific contract prohibiting foreign subcontracts.

3. Prior improper awards based upon bids failing to comply with appropriation act requirement of domestic manufacture do not justify repetition of error by accepting nonresponsive bid for award.

Penthouse Manufacturing Co., Inc., requests reconsideration of our decision in Penthouse Manufacturing Co., Inc., B-217480, Apr. 30, 1985, 85-1 CPD ¶ 487, denying the firm's protest that its bid was improperly rejected for not being responsive to invitation for bids (IFB) No. DLA100-84-B-1183. The solicitation was issued by the Defense Logistics Agency's (DLA) Defense Personnel Support Center, Philadelphia, Pennsylvania, for the procurement of combat coats.

We affirm our prior decision.

Our decision interpreted the standard contract clause, "Preference for Certain Domestic Commodities," set forth in the Department of Defense Supplement to the Federal Acquisition Regulation (FAR), 48 C.F.R. § 252.225-7009 (1984). Implementing a restriction routinely contained in Department of Defense (DOD) appropriations acts, this clause requires that all articles of clothing delivered under the contract be produced in the United States. 48 C.F.R. § 252.225-7009 (1984); DOD Appropriation Act, 1985, Pub. L. No. 98-473,

§ 101(h) [§ 8019], 98 Stat. 1926 (1984). In accordance with our decision in National Graphics, Inc., 49 Comp. Gen. 606 (1970), we found that the statutory restriction, as well as the standard contract clause, prohibits the procurement of articles of clothing unless the clothing's raw fibers and each successive stage of manufacture are domestic. We concluded that Penthouse, by specifying in its bid that some of the work required to produce the combat coats would be performed in Haiti, failed to comply with the "Preference for Certain Domestic Commodities" clause and, consequently, that Penthouse's bid was not responsive to the solicitation.

In its protest, Penthouse argued that the definition of "domestic end product" in the FAR provision implementing the Buy American Act, 48 C.F.R. § 25.101, should be used to determine whether clothing is produced in the United States for purposes of the appropriation act restriction. We rejected this argument because we found no basis for applying concepts and terms in the Buy American Act to the more restrictive appropriation act provision. In its request for reconsideration, Penthouse points out that the same definition of "domestic end product" is set forth in the DOD FAR Supplement, 48 C.F.R. § 225.001. Penthouse argues that this "domestic end product" definition must be considered in applying the appropriation act restriction, because the definitions in § 225.001 are applicable to all of part 225 of the supplement, which includes provisions implementing the appropriation act restriction.

The definition of "domestic end product" in 48 C.F.R. § 225.001 is applicable to use of the term elsewhere in part 225. However, the term is used in part 225 in connection with Buy American Act restrictions, not in sections addressing the appropriation act restrictions at issue here. Thus, we find no merit in Penthouse's argument that the DOD FAR Supplement definition is relevant to whether or not Penthouse's bid is responsive.

Penthouse also argues that the standard contract clause entitled "Overseas Distribution of Defense Subcontracts," 48 C.F.R. § 252.204-7005, supports its view of the applicable law. This clause provides that for each subcontract or modification that exceeds $10,000 and that will be performed outside the United States, the contractor must furnish certain information about the subcontract to the Defense Department. The clause must be included in all contracts expected to exceed $500,000 to assist the Department of

Defense in monitoring arms cooperation agreements. 48 C.F.R. § 204.670-4. Penthouse contends that, by requiring inclusion of this clause in contracts subject to the appropriation act restriction, the regulations recognize the possible use of foreign subcontracts.

We disagree. Many standard contract clauses are applicable only in certain circumstances. We find nothing inconsistent in the general requirement that the "Overseas Distribution of Defense Subcontracts" clause be included in all contracts exceeding a designated dollar threshold and the specific restrictions on foreign production contained in some contracts. The reporting clause would simply be inapplicable to performance of the DLA contract and would not contradict the appropriation act restriction and implementing clause.

Penthouse objected in its protest to the agency's failure to include the "Overseas Distribution of Defense Subcontracts" clause in the IFB as required by 48 C.F.R. § 204.670-4. We dismissed this basis of Penthouse's protest because it was not filed in a timely manner. The protester now argues that GAO cannot waive an applicable regulation and must enforce all legal requirements.

In dismissing Penthouse's argument, we did not "waive" the regulation or even decide whether the regulation was violated. Any legal duty that DLA may have had to include the clause was not extinguished because we declined to consider this portion of Penthouse's protest. Our dismissal of this issue was based on our recognition of the necessity to process protests in an orderly and timely manner. To this end, we require that protests based upon alleged improprieties apparent on the face of a solicitation be filed prior to bid opening. We will only consider the merits of a bid protest after the precise time required if good cause is shown or if the protest raises an issue significant to procurement practice or procedure. 4 C.F.R. § 21.2(c) (1985). Neither of these bases has been satisfied by Penthouse.

Finally, Penthouse argues that we failed to consider allegations that DLA has awarded contracts subject to the appropriation act restriction that were to be partially performed by foreign subcontractors. Assuming that this may have occurred, an improper award in other procurements does

not justify repetition of the same error. See Intex Insulating Co., B-216583, Oct. 11, 1984, 84-2 CPD ¶ 401.

We affirm our prior decision.

for Milton J. Socolar
Comptroller General
of the United States