

DECISION



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

FILE: B-221588; B-221588.2 DATE: May 5, 1986

MATTER OF: J.I. Case Company

DIGEST:

1. Protest is denied where it is the position of the Department of State, in consultation with the Office of Foreign Assets Control, Department of the Treasury, that an award to a wholly-owned subsidiary of a foreign corporation that is 15 percent-owned by the Government of Libya will not violate the Libyan Sanctions Regulations severing all direct economic relations with that government.
2. A bidder's actual compliance with Buy American Act certifications is an issue of contract administration. In the circumstances, however, it is recommended that the agency should verify that the low bidder's manufacturing approach will result in the supply of end products which qualify for waiver of the provisions of the Buy American Act before making an award to the firm.

J.I. Case Company protests the proposed award of a contract to Fiatallis North America, Inc. under invitation for bids (IFB) No. DLA700-85-B-4607, issued by the Defense Construction Supply Center, Defense Logistics Agency (DLA). The procurement is for the acquisition of 178 crawler tractors for use by the Marine Corps.^{1/} Case contends that: (1) an award to Fiatallis will be violative of the

^{1/} The term "crawler" denotes that the equipment is tracked, rather than wheeled. The tractors will have a military application, and a major requirement of the procurement is that they be within a specific weight limitation for transportation by helicopter to combat zones.

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public policy of the United States because the firm's ultimate corporate parent, Fiat S.p.A. of Italy, is substantially owned and controlled by the Government of Libya, a foreign power declared to be hostile to the interests of the United States; and (2) that the tractor models offered by Fiatallis will not be sourced from Italy, as certified in the firm's bid, but rather from Brazil, a country whose products are not entitled to a waiver of the provisions of the Buy American Act for purposes of bid evaluation. We deny the protest on both grounds.

(1) Connection with the Government of Libya

Bids were opened on December 6, 1985. Fiatallis was the low bidder with an offered unit price of \$43,500 per item, and Case was second low with offered unit prices ranging from \$49,770 to \$50,240 per item. On January 8, 1986, Case filed a protest with this Office alleging that award to Fiatallis would be improper because of the sanctions just imposed against further economic relations with the Government of Libya. On January 7, the President signed Executive Order No. 12,543, 51 Fed. Reg. 875 (1986), virtually ending all direct economic activities between the United States and the Government of Libya because Libya's involvement with acts of international terrorism made it a threat to the security of the United States. Section 4 of the Executive Order, in pertinent part, provides that:

"The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, as may be necessary to carry out the purposes of this Order"

Pursuant to section 4, the Office of Foreign Assets Control, Department of the Treasury, promulgated its Libyan Sanctions Regulations, 51 Fed. Reg. 1354-1359 (1986) (to be codified at 31 C.F.R. part 550), in implementation of Executive Order No. 12,543. Shortly thereafter, as authorized by Executive Order No. 12,544, 51 Fed. Reg. 1235 (1986), the Libyan Sanctions Regulations were amended to impose additional sanctions blocking all property and interests in property of the Government of Libya, its agencies, instrumentalities and controlled entities in the United States or that would come within the United States or within the possession or control of United States persons. 51 Fed. Reg. 2462-2467 (1986) (to be codified at 31 C.F.R. part 550).

Case argues that an award to Fiatallis would be in violation of the President's Executive Orders and the implementing Libyan Sanctions Regulations because Fiatallis, although incorporated in the United States, is, in fact, ultimately a wholly-owned subsidiary of Fiat S.p.A. of Italy, Italy's largest publicly-held corporation, and Fiat S.p.A. is substantially owned and controlled by the Government of Libya. In this regard, it is undisputed that the Libyan Arab Foreign Investment Company (LAFICO), a company owned by the Libyan Bank for Foreign Trade--an instrumentality of the Government of Libya--owns approximately 15 percent of Fiat S.p.A.'s common stock and has two seats on Fiat S.p.A.'s 15-member Board of Directors.

Case argues that the Executive Orders, although not expressly addressing the type of commercial transaction that would result from the award of a contract to Fiatallis, were implicitly intended to prohibit the bestowing of any economic benefit upon the Government of Libya. Case notes that, in the President's letter to the Speaker of the House of Representatives and the President of the Senate reporting upon the purposes of Executive Order No. 12,543, see 22 Weekly Comp. Pres. Doc. 21 (1986), the President stated that one purpose of the Order was to ban credits or loans "or the transfer of anything of value to Libya or its nationals" Case contends, therefore, that an award to Fiatallis will be contrary to the public policy of the United States because, through Libya's substantial ownership and control of Fiat S.p.A., the contract will represent the transfer of an economic benefit to Libya.

Moreover, Case asserts that a careful reading of the implementing Libyan Sanctions Regulations indicates that an award to Fiatallis would constitute a prohibited transaction. Case notes that the Regulations provide that no Libyan property or interests in property "may be transferred, paid, exported, withdrawn, or otherwise dealt in," 51 Fed. Reg. 2462 (to be codified at 31 C.F.R. § 550.209(a)), and that this prohibition against the transfer of Libyan property or interests in property "applies to payments and transfers of any kind whatsoever . . . including payment or transfer of dividend checks, interest payments, and other periodic payments." 51 Fed. Reg. 2462, 2464 (to be codified at 31 C.F.R. § 550.413). Case further notes that the transfer of any property interest "shall include the making . . . of any . . . contract," 51 Fed. Reg. 2462, 2463 (to be codified at 31 C.F.R. § 550.313); that a property interest is "an interest of any nature whatsoever, direct or indirect," 51 Fed. Reg. 2462, 2464 (to be codified at 31 C.F.R. § 550.315); and that if a property interest is transferred

to the Government of Libya, it "shall be deemed to be property in which there exists an interest of the Government of Libya." 51 Fed. Reg. 2462, 2464 (to be codified at 31 C.F.R. § 550.412(b)).

Case accordingly believes that the Libyan Sanctions Regulations preclude an award to Fiatallis because Libya's substantial ownership and control of the firm's ultimate corporate parent means that any fruits of the contract will, at least to some extent, flow to the Government of Libya and, therefore, will constitute a transfer of property interests prohibited by the imposed economic sanctions.

DLA takes the position that Case has not established that an award to Fiatallis would result in any of the prohibited transactions with the Government of Libya, since there is nothing to show that Libya has a direct ownership of the firm. In DLA's view, the relationship between Libya and Fiatallis is "very attenuated," and, therefore, that payments made to Fiatallis will not constitute prohibited transactions because they will not directly benefit the Government of Libya.

GAO Analysis

Although the Libyan Sanctions Regulations define the Government of Libya to include corporations which the Government of Libya or its instrumentalities substantially own or control, 51 Fed. Reg. 2462, 2463 (to be codified at 31 C.F.R. § 550.304(a)(2)), the real question seems to be whether Libya's involvement in Fiat S.p.A. means that the firm falls within the definition of what constitutes a "Libyan entity" with which commercial transactions are prohibited. As DLA notes, the terms "entity of the Government of Libya" and "Libyan entity" are defined in the Regulations to include "any corporation . . . in which the Government of Libya owns a majority or controlling interest, any entity substantially managed or funded by that government, and any entity which is otherwise controlled by that government." 51 Fed. Reg. 2462, 2464 (to be codified at 31 C.F.R. § 550.319(a)).

We note that as of March 14, 1984, the largest block of Fiat S.p.A.'s common stock, as recorded, was owned by what appears to be a purely Italian interest, the Istituto Finaz. Industriale S.p.A. with 27.6 percent, followed by

LAFICO's 15.2 percent ownership.^{2/} We have found no other evidence to indicate that this relationship between Italian and Libyan block interests has subsequently altered. Fiat S.p.A. also has publicly maintained that Libya's involvement in the firm is purely financial, as evidenced, for example, by the fact that Fiat S.p.A. has continued to export products to the State of Israel throughout its association with Libya.^{3/}

In any event, the Department of State has expressly advised this Office that:

" . . . The Treasury Department has the primary responsibility for making determinations regarding the scope of [the Libyan Sanctions Regulations]. We have consulted with the Office of Foreign Assets Controls at Treasury, and they have confirmed that the regulations do not prohibit dealings with companies, like Fiat S.P.A. of Italy or its subsidiaries, which are not substantially owned, managed, funded, or otherwise controlled by the Libyan government."^{4/}

We think it necessary to emphasize here that the regulations in issue are not procurement regulations, but rather regulations that implement the foreign policy of the United States promulgated by the administration. Therefore, in light of the position of the Department of State, in consultation with the Office of Foreign Assets Control, that an award to Fiatallis will not violate the Libyan Sanctions Regulations currently in effect, we must deny this portion of the protest.

^{2/} Standard & Poors Corporate Descriptions, Dialog Information Services, Inc., Mar. 6, 1986.

^{3/} Statement of Sig. Cesari Romiti, Fiat's group managing director, as reported in the Financial Times, London, Oct. 8, 1984.

^{4/} Letter of March 20, 1986, from James W. Dyer, Acting Assistant Secretary for Legislative and Intergovernmental Affairs. The Office of Foreign Assets Control, Department of the Treasury, has informally confirmed with us its determination that Fiat S.p.A. does not fall within the definition of a "Libyan entity" because Libya does not exercise control over the firm and has too small an equity position.

(2) Country of Origin of Fiatallis Tractors

Case also alleges that the tractors offered by Fiatallis will not be sourced from Italy, as certified in the firm's bid, but rather from Brazil, a country whose products do not qualify for waiver of the restrictions of the Buy American Act for purposes of bid evaluation.

The Buy American Act, 41 U.S.C. §§ 10a-10d (1982), creates a preference for the acquisition of domestic end products over foreign end products, except where it has been determined that it is inconsistent with the public interest to apply the Act to acquisitions of certain supplies from certain foreign countries. Federal Acquisition Regulation 48 C.F.R. §§ 25.102(a)(3); 25.103 (1984). In this regard, the Secretary of Defense has issued a blanket waiver from the Act's restrictions for end products from "participating countries," that is, NATO countries such as Italy with which the United States has a Memorandum of Understanding or similar agreement. Department of Defense Supplement to the Federal Acquisition Regulation (DOD FAR Supp.), §§ 25.001; 25.7401-7403 (DAC No. 84-1, Mar. 1, 1984).

In its bid, Fiatallis certified that the FD 9 model tractors it proposed to furnish would be manufactured in Italy and, therefore, that they qualified as "participating country end products." See DOD FAR Supp., § 52.225-7005(b)(i) (DAC No. 84-10, Jan. 10, 1985), as incorporated into the IFB. However, Case urges that this certification is subject to question because it has obtained evidence that the FD 9 tractors are not manufactured in Italy, but rather in Brazil. Case refers to a statement made by Fiatallis' managing director of its Brazilian plant, as reported in the London Financial Times for February 11, 1985, that the FD 9 tractor "can be obtained only from Brazil" Moreover, Case has furnished a December, 1985, report from the Corporate Intelligence Group (CIG), which states in a corporate profile of Fiatallis that the FD 9 model is sourced from Brazil, and that this has been corroborated in a direct communication between CIG and Fiatallis in Italy. According to Case, CIG states that Fiatallis has confirmed that the FD 9 "is not manufactured in Italy, though some bits are sent from Brazil for assembly into the agricultural version of the machine."

Therefore, Case argues that the agency is required to treat Fiatallis' bid as an offer of nonqualifying country end products and apply the appropriate Buy American Act evaluation differential required by regulation. Applicable here, a nonqualifying country offer of defense equipment

shall be adjusted for purposes of evaluation either by excluding any duty from the nonqualifying country offer and adding 50 percent of the offer (exclusive of duty) to the remainder, or by adding to the nonqualifying country offer (inclusive of duty) a factor of 6 percent of that offer, whichever results in the greater evaluated price. DOD FAR Supp., § 25.105(1) (DAC No. 84-1, Mar. 1, 1984). Since Fiatallis' bid of \$7,930,025, when increased by the addition of the 50 percent differential, becomes higher than Case's bid of \$9,109,512, Case contends that it is entitled to the award.

In response to Case's allegation, DLA sought and obtained verification from Fiatallis that the tractors would be manufactured in Italy, as originally certified in the firm's bid. DLA does not believe that Case's evidence to the contrary is persuasive or that it precludes an affirmative determination of Fiatallis' responsibility as a prospective contractor without the need for a preaward survey. DLA's essential position is that Fiatallis has obligated itself to furnish FD 9 tractors made in Italy, and, therefore, the question of whether Fiatallis will ultimately honor that commitment is solely a matter of contract administration embraced by the provisions of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1982).

GAO Analysis

As a general matter, this Office regards a bidder's actual compliance with Buy American Act certifications to be an issue of contract administration having no effect upon the validity of an award. See Autoclave Engineers, Inc., B-217212, Dec. 14, 1984, 84-2 CPD ¶ 668. Under this standard, we have declined to consider allegations that a bidder misrepresented in its bid that it would supply domestic end products because this would entail the review of a postaward matter of contract administration beyond the scope of our Bid Protest Regulations. See, e.g., Bender Shipbuilding & Repair Co., Inc., B-219629.2, Oct. 25, 1985, 85-2 CPD ¶ 462. DLA is correct in its position that Fiatallis has contractually obligated itself to furnish FD 9 tractors manufactured in Italy and that the firm's ultimate compliance with the certification is an issue of contract administration. Therefore, we deny Case's protest on this issue.

Nevertheless, we are mindful of the statement made by Fiatallis at the administrative conference convened on the protest that the contemplated contract will represent the

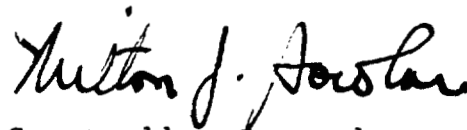
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first instance in which the FD 9 tractors will be manufactured in Italy rather than in Brazil. Fiatallis also stated that it often makes the FD 9 tractor in Brazil in kits, a fact which Case believes reasonably suggests that certain Brazilian-made components may be utilized during production of the tractors in Italy. As Case notes, an end product manufactured in a "participating country" qualifies for waiver of the Buy American Act provisions only if the cost of its qualifying country components and its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. DOD FAR Supp., § 25.001, supra.

Under the circumstances, we are recommending to the Director of DLA by separate letter of today that the agency verify that Fiatallis' manufacturing approach will result in the supply of end products which qualify for waiver of the provisions of the Buy American Act before making an award to the firm. See Ampex Corp., B-203021, Feb. 24, 1982, 82-1 CPD ¶ 163.

for 
Comptroller General
of the United States