



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Sandtex Corporation

File: B-224527

Date: January 30, 1987

DIGEST

1. Defense Logistics Agency properly includes a clause in a solicitation for silica cloth that applies a 50-percent evaluation factor to foreign offers, since Department of Defense (DOD) Federal Acquisition Regulation Supplement provides that such a factor must be applied to foreign offers for DOD acquisitions, and the regulation is a proper implementation of the Buy American Act.

2. Contracting officer may cancel an invitation for bids where he reasonably determines that the acceptable bids offering domestic end products are unreasonable in price notwithstanding that a foreign offer, before the addition of a 50-percent Buy American Act evaluation factor, would be reasonably priced, since the foreign offer is properly evaluated at a higher price than the domestic offers.

DECISION

The Sandtex Corporation protests the provision in request for proposals (RFP) No. DLA100-86-R-0864, issued by the Defense Logistics Agency's Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania, applying an evaluation factor of 50 percent to the price of any bid that offers a foreign end product (foreign offer). This factor was included in the RFP pursuant to the Department of Defense Supplement to the Federal Acquisition Regulation (DOD FAR Supp.), 48 C.F.R. § 225.105 (1985), which implements the Buy American Act, 41 U.S.C. § 10a-10d (1982).

We deny the protest.

The RFP is a resolicitation for 110,000 yards of silica cloth originally sought under invitation for bids (IFB) No. DLA100-86-B-0469 that was canceled after the contracting officer determined that all acceptable bids were unreasonable in price. Under the original IFB, Sandtex's price was low (and

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apparently reasonable) before the application of the 50-percent evaluation factor to the price of its offered Japanese end product, but was evaluated as being higher than two unreasonably priced acceptable bids offering domestic end products (domestic offers). Sandtex contends that the DOD FAR Supp. provision does not apply to silica cloth but only to certain specific items of defense equipment covered by agreements with foreign governments, and that DPSC erroneously applied the 50 percent evaluation factor to this procurement. Sandtex also questions the fairness of canceling the IFB.

The Buy American Act creates a preference for the acquisition of domestic end products unless the head of the contracting agency determines it to be inconsistent with the public interest or the cost to be unreasonable. 41 U.S.C. § 10a. Under Executive Order No. 10582, Dec. 17, 1954, implemented by FAR, 48 C.F.R. subpart 25.1 (1986), the preference is applied by adding to the price of a foreign offer either: 1) a 6-percent evaluation factor, inclusive of duty, if the competing domestic offer is a large business that is not a labor surplus concern; or 2) a 12-percent factor if the competing domestic offer is from a small business or labor surplus area concern. If the price for the domestic offer exceeds the evaluated price of the foreign offer the domestic offer's price is unreasonable and the preference under the Buy American Act does not apply.

Executive Order No. 10582 also authorizes the head of an agency to apply a larger evaluation factor to foreign end products. We have held that DOD FAR Supp., 48 C.F.R. § 225.105, applying a 50-percent differential to foreign offers of defense equipment, is a proper exercise of that authority and does not conflict with the FAR. Westinghouse Elec. Corp., B-223992 et al., Sept. 4, 1986, 86-2 CPD ¶ 263.

The procurement regulations, particularly the DOD FAR Supp., include several instances where the preference under the Buy American Act has been determined to be inconsistent with the public interest and certain qualifying country end products may be evaluated without regard to the preference. See FAR, 48 C.F.R. § 25.103; DOD FAR Supp. subparts 25.73-25.75. The qualifying countries generally are members of the North Atlantic Treaty Organization and certain other countries, but not Japan, with whom the United States has cooperative defense and foreign military sales/offset agreements.

Further, there are regulations implementing the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2581 (1982 and Supp. III 1985) providing that the Buy American Act preference does not apply to procurements of certain eligible products

from designated countries over a dollar threshold. FAR, 48 C.F.R. subpart 25.4, DOD FAR Supp., 48 C.F.R. Subpart 25.4; Leland Ltd., B-224175, Dec. 24, 1986, 86-2 CPD ¶ _____. While Japan is a designated country, silica cloth is not an eligible product for the purpose of applying an exception to the Buy American Act preference.

The crux of the protester's argument is that since DOD FAR Supp., 48 C.F.R. § 225.105, by its own terms applies only to the acquisition of "defense equipment," the intent of the regulation is to apply the 50-percent factor only to non-qualifying foreign offers of the specific equipment exempted from the Buy American Act preference based on cooperative defense and foreign military sales/offset agreements. In all other cases, according to the protester, the 6-percent or 12-percent factor provided in the FAR should be applied.

We find no merit in this argument since DOD FAR Supp., 48 C.F.R. § 25.001, broadly defines defense equipment for the purpose of applying the Buy American Act preference to mean any equipment, item of supply, component, or end product purchased by DOD. Furthermore, the protester's argument ignores the plain purpose of the Buy American Act to protect domestic sources as opposed to protecting qualifying countries' sources for certain items for which it has been determined in the government's interest not to apply the Buy American Act's preference. The terms of DOD FAR Supp. purport to implement the Buy American Act, not certain foreign agreements, by applying a 50-percent evaluation factor, see DOD FAR Supp., 48 C.F.R. §§ 24.102(70) and 205.105, and the protester has failed to show that the regulation is improper or should be interpreted otherwise. The inclusion of the 50-percent evaluation factor in both the original IFB and the current RFP therefore was proper.

The protester also argues that notwithstanding the inclusion in the IFB of a provision stating that offers will be evaluated in accordance with the procedures of FAR, 48 C.F.R. Part 25, and DOD FAR Supp., 48 C.F.R. Part 225, the agency's application of the 50-percent evaluation factor was inconsistent with a clause requiring an indication of the amount of duty to evaluate foreign offers "under FAR Subpart 25.1." The protester relies on the failure of the cited clause to reference the applicable DOD FAR Supp. provision. We point out that the purpose of the cited clause was only to ascertain the applicable duty, not to establish how foreign offers would be evaluated, and that the IFB as a whole was clear that DOD FAR Supp., 48 C.F.R. Subpart 25, would be applied for evaluation purposes.

Finally, as regards the fairness of canceling the IFB, the contracting officer canceled the IFB pursuant to FAR, 48 C.F.R. § 14.404-1(c)(b), which expressly authorizes canceling an IFB where the head of the agency determines that "all otherwise acceptable bids . . . are at unreasonable prices." (The authority to make this determination generally is delegated to the contracting officers.) Sandtex's foreign offer was not an otherwise acceptable bid since the FAR permits the acceptance of a foreign offer only where acceptable domestic offers exceed the evaluated price of the foreign offer including the Buy American Act differential, and the two acceptable domestic offers did not exceed Sandtex's evaluated price. Nothing in Executive Order No. 10582 or its implementing regulations requires the contracting officer to accept domestic offers evaluated at a lower price than the foreign offer if the contracting officer reasonably determines the domestic prices to be unreasonable. In such cases, the contracting officer properly may cancel the IFB and resolicit.

Sandtex further questions the fairness of the cancellation by pointing out that its prices were exposed. Although Sandtex's price was disclosed under the canceled IFB, the resolicitation provides Sandtex with another opportunity to bid for a contract it otherwise would have been ineligible to obtain. The protester therefore was not prejudiced by the disclosure of its price under the canceled IFB. See Western Roofing Serv., B-219324, Aug. 30, 1985, 85-2 CPD ¶ 255.

The protest is denied.

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