The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Richlyn Laboratories, Inc.--Reconsideration

File: B-225046.2

Date: May 6, 1987

DIGEST

1. Protester was not prejudiced by contracting officer's premature award of a contract for a drug to the low bidder evaluated without the Buy American Act preferences where the contracting officer relied on advice from the Directorate of Medical Materiel that the drug was only available from foreign sources and where the Directorate of Medical Materiel subsequently determined in writing that the drug was not available in the United States in sufficient and reasonably available commercial quantities and that therefore the Buy American Act should be waived.

2. Arguments that amount to a reiteration of those previously considered do not provide a basis for reconsideration.

DECISION

Richlyn Laboratories, Inc. (RLI) requests reconsideration of our decision, Richlyn Laboratories, Inc., B-225406, Jan. 29, 1987, 87-1 CPD ¶ ___, denying a protest against the award of a contract to Barr Laboratories, Inc. by the Defense Personnel Support Center, Defense Logistics Agency (DLA), Philadelphia, Pennsylvania under invitation for bids (IFB) No. DLA120-86-B-1605 for 71,604 bottles of hydrochlorothiazide tablets.

We affirm our prior decision.

RLI had contended that it offered a domestic end product manufactured in the United States with a component drug from a qualifying country (Italy), exceeding 50 percent of the costs of all components, under the Buy American Act, 41 U.S.C. § 10a-d (1982), and therefore should have been evaluated with the Buy American preferences as the low, responsive, domestic offeror entitled to award. DLA,

however, did not apply the Buy American Act to the procurement because the Directorate of Medical Materiel determined that the major component in question was available only from foreign sources without a domestically available substitute, i.e, that the drug was not available in the United States "in sufficient and reasonably available commercial quantities."1/ Accordingly, DLA proceeded to make an award to the low offeror (evaluated without the Buy American Act preferences) which offered an end product manufactured in the United States with the foreign drug component, exceeding 50 percent of the costs of all components, from a nonqualifying country (Yugoslavia).

In our initial decision, we found that since all seven bidders that competed had proposed foreign sources (some albeit qualifying country sources) for the active ingredient, the Directorate of Medical Materiel's determination that only a foreign drug will fulfill the requirement had not been shown to be unreasonable. We concluded that the Buy American preferences were properly not invoked in favor of the RLI bid. This is because the Buy American Act does not apply to "components of end products manufactured in . . . a qualifying country if the component is . . . not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities." See Department of Defense FAR Supplement, 48 C.F.R. § 225.102(70)(3). We therefore denied the protest.

In its request for reconsideration, RLI principally contends that the Buy American Act was not properly waived because the contracting officer made a premature award prior to the determination by the Directorate of Medical Materiel that the drug was not available from domestic sources. The record in fact does show that bid opening was on August 12, 1986, that the award to Barr was made on September 11, 1986, and that the determination of domestic unavailability by the Directorate of Medical Materiel was made on October 3, 1986.

1/This determination by the Directorate of Medical Materiel was the authority relied upon by the agency for not applying the Buy American Act; when such a determination is made by the Directorate of Medical Materiel, the agency is not required to make a separate nonavailability determination under the Buy American Act. See Department of Defense FAR Supplement, 48 C.F.R. § 225.102(70)(3), (71), and (72)(2).

In response, the contracting officer explains that he determined after bid opening that the drug was unavailable domestically but he also recognized that he had to obtain a determination of unavailability from the Directorate of Medical Materiel. The contracting officer states that he "was aware that it would take at least a week to obtain [the determination from the Directorate] in view of the many layers of coordination required." To save time, he had his procurement representative call the Directorate which apparently informally confirmed that only foreign drugs were available for the requirement (the foreign sources proposed by the bidders in this procurement were on a list of approved foreign suppliers at the Directorate). The contracting officer therefore proceeded to make an award "rather than wait a week or more for confirmation of information already known."

Even if we assume that the contracting officer should have waited until he obtained a written determination by the Directorate of the unavailability of the drug, we find that his failure to do so did not harm the protester. The Directorate here subsequently made a valid determination for this specific solicitation. The Directorate is the designated authority under the regulations for making such determinations. See Department of Defense FAR Supplement, 48 C.F.R. § 225.102(72)(2). In short, we think that had the contracting officer waited, the same determination by the Directorate for this solicitation would have been issued so that we fail to see any prejudice to RLI solely because of the premature award.

In this regard, RLI again argues, as it did in its initial protest, that it did not offer a foreign drug. In essence, RLI argues that it offered a domestic end product with a qualifying country component and therefore DLA could not consider the component unavailable because the qualifying country component was the "contextual equivalent of a domestic component" and should be treated for all purposes as a purely domestic end product with domestic components. As we stated in the initial decision, a determination of nonavailability of a component in the United States must be made on the basis of whether the component is mined, produced or manufactured in the United States in sufficient and reasonably available commercial quantities and not whether it is available from a foreign qualifying country.

Finally, RLI, after the award to Barr, found a domestic supplier of the drug and now again argues that the component is available domestically which allegedly shows that

the DLA determination was "incompetent." In our initial decision, we concluded that since all seven bidders offered foreign sources for the component, the Directorate reasonably concluded that the component was "not mined, produced or manufactured in the United States in sufficient and reasonably available commercial quantities." RLI has added nothing to what we previously considered on this issue. Arguments that amount to a reiteration of those previously considered do not provide a basis for reconsideration. Vulcan Engineering Co.--Request for Reconsideration, B-214595.2, Feb. 27, 1985, 85-1 CPD ¶ 243.

Our prior decision is affirmed.

Harry R. Van Cleve
General Counsel