R.Beck

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Orlite Engineering Company, Ltd.

File: B-227157

Date: August 17, 1987

DIGEST

1. Where a protester offers in writing for the first time in an agency-level protest to change place of performance in a negotiated procurement 6 months after the submission of best and final offers, the agency properly could decline to consider the late modification. Acceptance of such a modification would require the agency to reopen discussions with all offerors, and the decision not to reopen discussions will not be disturbed by the General Accounting Office (GAO) so long as the agency reasonably exercises its discretion in making that decision.

2. An agency properly may factor in the time and expense of preaward surveys, either already conducted or which would be required as a result of reopening discussions, in determining whether it is in the government's best interest to reopen discussions after best and final offers.

3. General Accounting Office will not review an agency determination not to waive Buy American Act requirements since Buy American Act vests discretion as to waiver in the head of the concerned agency.

DECISION

Orlite Engineering Company, Ltd., an Israeli firm, protests the award of a contract for a quantity of SPH-4 Flying Helmets to Gentex Corporation under request for proposal (RFP) No. DLA100-86-R-0726 issued by the Defense Personnel Support Center (DPSC). The protester argues that DPSC improperly applied a 50 percent evaluation factor under the Buy American Act (BAA), 41 U.S.C. § 10a et seq. (1982), since, according to the protester, it is offering a domestic end product. In the alternative, the protester argues that, even if it is concluded that it is not offering a domestic end product, the DPSC improperly refused to waive the application of the BAA price differential.

We deny the protest in part and dismiss it in part.

The solicitation was issued on August 29, 1986, and called for offers for 15,000 each, SPH-4 flying helmets. Initial offers were to be submitted by October 1, and on that date four offers were received. Based upon the initial offers submitted the contracting officer concluded that Orlite was not within the competitive range on grounds that Orlite was not offering a domestic end product and consequently the application of the 50 percent price differential under the BAA was warranted. On October 15, best and final offers (BAFOs) were solicited from the three remaining firms and were to be submitted by October 22. Subsequently, the date for the submission of BAFOs was extended to October 30, and Orlite was given an opportunity to submit a BAFO as a result of discussions between the Defense Logistics Agency (DLA) and the Israeli Embassy.

In reviewing the BAFOs, DPSC concluded that the offer of Orlite would be low absent the application of the 50 percent BAA differential, and prepared the necessary documentation to request a waiver of the differential, which was submitted to DLA on March 18, 1987.1/ Subsequently, on April 17, Orlite submitted an agency-level protest alleging, among other things, that the waiver request was unnecessary on grounds that Orlite was offering a "domestic end product" within the meaning of the BAA. In particular, Orlite stated in its agency-level protest that the SPH-4 flying helmet which it was offering met the domestic content threshold of the BAA and that final assembly of the helmet was to occur "in New York." Orlite also states that it advised the agency orally in December 1986, after submission of BAFOs, that it would perform final assembly in New York.

On April 28, the BAA waiver request was returned to DPSC unapproved. Thereafter, on May 15, award was made to Gentex, the second low offeror, and Orlite filed its protest in our Office on May 24.

1/ Under a 1984 Memorandum of Agreement (MOA) executed between the United States and Israel, the BAA differential is waived with respect to a specified list of products which appears in "Annex B" to the MOA. The SPH-4 flying helmet is not listed among those products specifically excluded from the application of the BAA differential. However, Article I, clause 1(e) of the MOA provides that the absence of an item from Annex B is without prejudice to the authority of the Secretary of Defense to waive the application of the BAA differential on a case-by-case basis. See Annex T to the Department of Defense Federal Acquisition Regulation Supplement for a complete text of the MOA.

Orlite first argues that both the application of the 50 percent price differential under the BAA and the waiver request were inappropriate, since it was offering a domestic end product. In particular, the protester points to the definition of "domestic end product" contained in the Department of Defense Federal Acquisition Regulation Supplement (DFARS), 48 C.F.R. § 225.001 (1985), which states in the second part of the definition that a "domestic end product" is "an end product manufactured in the United States if the cost of its . . . components which are mined, produced or manufactured in the United States exceeds 50 percent of the cost of all its components." According to the protester, the cost of the components which are manufactured or produced in the United States exceeds 50 percent of the cost of all components which make up the SPH-4 flying helmet offered by it. Additionally, the protester urges that the end item would be "manufactured in the United States," since final assembly would take place in New York.

The agency responds that, while the Orlite helmet may meet the 50 percent component cost threshold, the item would not be "manufactured in the United States" as is required under the above-referenced definition. The agency points out that the Orlite BAFO indicated that the place of performance and location for inspection and acceptance by the government was to be the Orlite plant, Industrial Zone A, Ness-Ziona, Israel. Furthermore, the agency notes that under clause K-89, all offerors were required to stipulate the place of performance in their offer and the place of performance indicated in an offer could not be changed after the submission of BAFOs and before award absent written approval of the contracting officer. According to the agency, Orlite made an "11th hour request" to change the place of performance between the time BAFOs were submitted and the time of award. Additionally, the agency argues that the Orlite "request" was made within the context of an agency-level protest and by a third party (i.e. counsel for Orlite) who could in no way bind Orlite to perform at the changed locale. Accordingly, the agency argues that it properly disregarded the "request" to change the place of final assembly.

Orlite asserts that in December 1987, in two telephone conversations with contracting personnel, Orlite advised DPSC that final assembly of the end item would be performed in the United States at the facility of a New York subcontractor. Thus Orlite argues the agency knew of the change in Orlite's place of performance approximately 6 weeks after submission of BAFOs, and prior to DPSC's preaward survey. DPSC denied that it was verbally advised of the change, stating, as noted above, that it first

learned of Orlite's change in location for final assembly from Orlite's agency-level protest.

We find nothing in the record to indicate that Orlite's alleged offer to change its place of performance was made before Orlite's agency-level protest in April. The record shows that Orlite did not challenge DPSC's conduct of the preaward survey at Orlite's facility in Israel or ever request that the agency survey a New York site. In fact, the letters to Orlite from its subcontractors are addressed to that firm's facility in Israel or its Washington, D.C. office, and do not indicate any arrangement for final assembly in the United States. The record fails to show that Orlite communicated to DPSC the revision in its offer until its agency-level protest.

In any event, allowing Orlite to change the place of performance for final assembly purposes would have constituted a reopening of discussions, since to allow Orlite to change the place of final assembly would have materially modified Orlite's proposal. In this regard, we note that an agency may, but is not required to, reopen negotiations by requesting new BAFOs when to do so is clearly in the governments best interest. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.611(c) (1986). The decision whether to reopen discussions is discretionary with the contracting officer. Scientific Systems, Inc., B-225574, Jan. 6, 1987, 87-1 CPD ¶ 19. We believe further that the considerations surrounding an agency's decision to open discussions in the first instance apply with equal force to a decision whether to reopen discussions after BAFOs. In connection with this exercise of discretion, we have held that in resolving the question of what is in the "best interests of the government" an agency may properly factor the time and expense of preaward surveys into the determination of potential savings from opening discussions. The Marquardt Co., B-224289, Dec. 9, 1986, 86-2 CPD ¶ 660. Within the context of this case, we believe that the agency's decision to disregard Orlite's late modification--offered almost 6 months after the submission of BAFOs and after substantial administrative expense--was a reasonable exercise of its discretion. Accordingly, this ground of protest is denied.

The protester also argues in the alternative that the agency improperly refused to grant it a waiver of the application of the 50 percent price differential under the BAA. In particular, the protester points to a memorandum dated April 10, in which it is recommended that the Director of DLA deny the request for a waiver of the BAA differential. According to the protester, this memorandum demonstrates that the waiver request was improperly denied because the

agency decided to restrict the award to a domestic source after issuing the RFP without such a restriction.

This Office has consistently declined to review an agency's determination not to waive the BAA differential. See, e.g., Rudel Machinery Co., Inc., B-224606, Nov. 6, 1986, 86-2 CPD ¶ 529. Such determinations necessarily involve the exercise of discretion in balancing buy-American and foreign policy considerations. Id. The exercise of this discretion is vested by statute in the heads of agencies, 41 U.S.C. § 10a, and consequently we will not question a determination by an agency to refuse to waive the application of the BAA requirements. Rudel Machinery Co., Inc., B-224606, supra. Accordingly, we dismiss this basis of protest.

The protest is denied in part and dismissed in part.

for Seymour Efros
Harry R. Van Cleve
General Counsel