



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hewlett-Packard Co.

File: B-228271

Date: December 3, 1987

DIGEST

1. Protest by brand-name offeror under negotiated brand-name-or-equal procurement that agency improperly made award to firm whose proposal did not meet one of solicitation's salient characteristics is denied where protester is unable to demonstrate that agency's technical judgment that awardee's product meets the solicitation's salient characteristic is unreasonable.

2. Agency properly concluded that low offeror was not subject to evaluation under the Buy American Act where the evidence available at time of award shows that the item offered was a domestic end product as defined under the Act since it is manufactured in the United States and the cost of foreign components do not exceed 50 percent of the cost of all components.

DECISION

Hewlett-Packard Co. protests the award of a contract to Mirror Electronics Company under request for proposals (RFP) No. F08651-87-R-0098, issued by the United States Air Force, Armament Division, Eglin Air Force Base, Florida. The RFP solicited an X-Ray System, 150KV Hewlett-Packard PN 43731A or equal.^{1/} Award was made to Mirror, the low technically acceptable offeror, on September 14, 1987 at a price of \$104,914.00. Hewlett offered a price of \$134,693.00. Hewlett protests the award on two grounds: first, the Scandiflash product offered by Mirror does not meet one of the RFP's salient characteristics; second, even though

^{1/} The system is to be used to collect velocity, projectile information, and target impact data during the testing of anti-armor warheads in support of the Heavy Metal Weapons Research and Development Facility.

Hewlett's offered price was higher than Mirror's, Hewlett should have been selected based on the Buy American evaluation preference contained in the RFP.

We deny the protest.

The RFP listed five salient characteristics including a requirement for "pre-pumped remote tube heads requiring no external voltage at detonation area prior to detonation." Hewlett contends that award to Mirror is improper because Mirror will offer a product manufactured by Scandiflash in Sweden and to its knowledge, Scandiflash does not produce any equipment with "pre-pumped remote tube heads requiring no external voltage at detonation area prior to detonation."

Mirror quoted Scandiflash model 150 KV Flash X-Ray System and furnished descriptive literature. Mirror asserted that its offered system is manufactured with demountable tubes that are pre-pumped and installed in the tubeheads and they require no external voltage at the detonation area during or prior to detonation since all electrical power is removed.

As a result of the technical evaluation of the data submitted by Mirror, the Air Force ultimately concluded that the Scandiflash X-Ray, Model 150 met all the salient characteristics and exceeded the government's minimum needs.

Generally, where the contracting agency finds that the awardee's product is equal to a specified brand name product, we will not disturb that finding absent a showing that the product, in fact, is not equivalent to the brand name product or that the finding is otherwise erroneous, so long as the awardee's descriptive literature is not insufficient on its face. VARTA Batterie AG, B-225484, Mar. 19, 1987, 87-1 CPD ¶ 311; see Polarad Electronics, Inc., B-204025, Nov. 12, 1981, 81-2 CPD ¶ 401.

In its comments to the agency report, Hewlett argues that the only reasonable interpretation of the RFP's requirement for "pre-pumped remote tube heads" is that it calls for factory-sealed X-Ray tubes that the Air Force will not have to pump every time the unit is moved or otherwise loses its AC power source. Consequently, Hewlett contends that Mirror's proposed demountable tube, which according to Hewlett must be assembled and pumped when the unit is installed or when the unit loses its power source or its connection to an iron pump, does not satisfy the government's minimum needs. We do not agree.

The RFP merely requires that the X-Ray System have pre-pumped remote tube heads requiring no external voltage at the detonation area prior to detonation. The agency

examined the descriptive data submitted by Mirror and concluded that the remote tube head proposed by Mirror, although apparently of a different design than Hewlett's product, met its needs. Based on our review of the agency's evaluation, we conclude that the Air Force's requirement for a pre-pumped tube relates to its desire to be able to pump the tube prior to placing it in the detonation area without the need for any external voltage at the detonation site, as clearly stated in the RFP. Mirror's offer showed compliance with this stated requirements. The protester has not demonstrated that Mirror's product does not in fact meet the "pre-pumped" requirement, but merely contends that Mirror's system requires the Air Force to follow a more elaborate procedure for installation and use. Under these circumstances, we do not find the agency's determination that Mirror's product meets the RFP requirements and their minimum needs unreasonable.

Hewlett next argues that since this procurement is subject to the Buy American Act, 41 U.S.C. §§ 10a-d (1982), and Mirror has offered a product manufactured in Sweden by Scandiflash, a Swedish firm, an evaluation factor should have been added to Mirror's offer. Hewlett maintains that, with application of this factor, its offer would be low, entitling it to the contract award.

The Buy American Act establishes a preference for domestic products over foreign products through the use of an evaluation differential that is added to the price of the foreign product. The Act, as implemented by the Department of Defense Federal Acquisition Regulation Supplement, 48 C.F.R. § 225.001 (1986), defines a domestic end product as "an end product manufactured in the United States if the cost of its qualifying country components and its components which are mined, produced or manufactured in the United States exceed 50 percent of the cost of all its components." We have interpreted the term manufacture to mean completion of the article in the form required for use by the government. See 46 Comp. Gen. 784, 791 (1967).

In its proposal, Mirror certified that its x-ray system was assembled in the United States and over 51 percent of the cost of the end item was domestic. Since Mirror's offer indicated the use of foreign parts, the contracting officer discussed the cost percentage of the foreign parts with Mirror on September 2 and 3. In response, Mirror, by letter dated September 11, 1987 and prior to award, confirmed that it had acquired a license to manufacture and assemble the Scandiflash X-Ray System in the United States and that 67 percent of the components were domestic, some of which were listed by manufacturer. On the basis of this information, the contracting officer determined Mirror's x-ray system to

be a domestic end product and therefore no Buy American differential was applied to Mirror's offer.

It is Hewlett's position that Mirror's certification contained information inconsistent with Mirror's assertion of United States manufacturing and therefore the contracting officer had a duty to further investigate the origin of Mirror's system. Moreover, Hewlett states that despite Hewlett's identification of inconsistent information provided by Mirror in an October 26, 1987 (post-award) letter to the contracting officer, the Air Force still failed to further investigate the certification.

We have held that an agency should not automatically rely on certifications of compliance with the Buy American Act when it has reason to question whether a domestic product will be furnished. Designware, Inc., B-221423, Feb. 20, 1986, 86-1 CPD ¶ 181. In this case, the contracting officer did not rely on the certification alone. He contacted Mirror to specifically discuss the foreign content of Mirror's end product. As a result, at time of award, the contracting officer had Mirror's certification, a letter of agreement between Mirror and Scandiflash indicating that it was licensed to manufacture the x-ray system in Gaston, Oregon, and a list of several components that made up approximately 67 percent of the end item along with their United States manufacturers. Under these circumstances it appears that the contracting officer did all that was reasonably necessary to ensure that Mirror would in fact deliver a domestic end product. See Designware, Inc., B-221423, supra. Consequently, we think that the Air Force properly did not apply the Buy American Act evaluation factor to Mirror's offer.

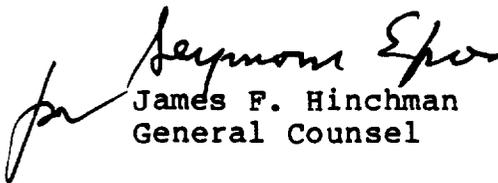
Similarly, the information provided to the agency by Hewlett more than a month after award does not necessarily suggest that Mirror does not intend to supply a domestic end product. See Wire Rope Corporation of America, Inc., B-225672, Mar. 13, 1987, 87-1 CPD ¶ 286. By letter dated October 26, 1987, Hewlett provided the agency a copy of a recent Dun & Bradstreet report listing Mirror as having only two employees, including the owner, and only \$31,000 worth of fixtures and equipment. Hewlett argues this indicates that Mirror does not have the capacity to manufacture or assemble the system. However, this post-award information does not take into consideration the fact that Mirror's license just became effective on September 19, 1987, possibly too early for any planned expansion based on the licensing agreement to be included in a recent Dun & Bradstreet report. Also, Mirror could elect to subcontract the manufacturing process to a domestic company.

Additionally, to the extent that Hewlett is now challenging the status of Mirror as a manufacturer, this Office does not consider the legal status of a firm as a regular dealer or a manufacturer within the meaning of the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1982). By law, this matter is to be determined by the contracting agency, in the first instance, subject to review by the Small Business Administration (where a small business is involved) and the Secretary of Labor. Semco, Inc., B-216474, Oct. 9, 1984, 84-2 CPD ¶ 395.

Finally, Hewlett's protest raises numerous concerns regarding Mirror's ability to perform this contract, referencing the Air Force's failure to consider the Dun & Bradstreet report and all other information provided by Hewlett and especially the Air Force's failure to conduct a preaward survey. The Air Force reports it determined Mirror responsible based on its satisfactory performance of prior contracts and its submission of a technically acceptable offer.

Our Office will not review affirmative determinations of responsibility unless the protester shows possible fraud or bad faith on the part of the contracting officials, or alleges that the solicitation contains definitive responsibility criteria which have been misapplied. Arcwel Corp., B-224835, Oct. 1, 1986, 86-2 CPD ¶ 373. The latter exception clearly does not apply, and the evidence furnished by Hewlett only involves factors that could be considered in determining Mirror's responsibility; it does not show possible fraud or bad faith. See Teledyne CME, B-223609, Sept. 23, 1986, 86-2 CPD ¶ 338. Further, a preaward survey is not a legal prerequisite to an affirmative determination of responsibility; contracting officials have broad discretion concerning whether to conduct surveys and may use other information available to them concerning a bidder's capability. See Hercules Painting, B-223647, July 31, 1986, 86-2 CPD ¶ 131.

The protest is denied.


James F. Hinchman
General Counsel