



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Barcode Industries, Inc.

File: B-240173

Date: October 16, 1990

Paul F. Khoury, Esq., Wiley, Rein & Fielding, for the protester.
Robert E. Gregg, Esq., Hazel, Thomas, Fiske, Weiner, Beckhorn & Hanes, for CAT Enterprises, Inc., an interested party.
E. L. Harper, Department of Veterans Affairs, for the agency.
Scott H. Riback, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly relied upon awardee's Buy American Act certification in connection with firm's obligation to furnish domestic end products is denied where contracting officer had no information at time of award which would have led her to believe that awardee would not furnish domestic end products.
2. Protest that agency improperly waived solicitation requirement that product furnished have been formally announced for marketing purposes on or before the closing date for the submission of initial offers is denied where awardee's technically acceptable offer contained statement that product had been announced at time of closing, and agency had no reason to question statement.
3. Protest that firm is nonresponsible because it will allegedly manufacture a product which, for reasons of copyright infringement, it is enjoined from manufacturing is dismissed because: (1) General Accounting Office (GAO) does not review affirmative responsibility determinations except in limited circumstances not present in this case; and (2) in any event, a copyright dispute is essentially a private party dispute not for adjudication by GAO.

GAO 1715a / 142479

DECISION

Barcode Industries, Inc. protests the award of a contract to CAT Enterprises, Inc. under request for proposals (RFP) No. 101-13-90, issued by the Department of Veterans Affairs (VA) for the acquisition of a quantity of barcode readers. Barcode argues that the agency improperly awarded the contract to CAT because the firm will not be furnishing a domestic end product and will not be furnishing a product which conforms to the RFP's requirement that the item have been formally announced for marketing purposes on or before the closing date for the submission of initial offers. Barcode also argues that CAT is not a responsible offeror because the firm will be supplying Barxon Electro-Optic, Inc. barcode readers which Barxon is allegedly enjoined from manufacturing because of infringement of Barcode's copyright.

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

The RFP was issued as a 100 percent small business set-aside and called for the submission of firm, fixed-price offers for a definite quantity of barcode readers as well as various spare parts, accessories and user manuals. The RFP provided that award would be made to the low, technically acceptable offeror and that award could be made based on initial offers. In response to the solicitation, the VA received seven initial offers, one of which was rejected as late. After technical evaluation of the remaining six proposals, three offers were determined technically acceptable, including the CAT and Barcode offers.

In its proposal CAT offered to furnish the Barxon BX-100-WL barcode reader. The CAT offer stated that the BX-100 series had been in production for approximately 1 year and that the BX-100-WL had been recently announced for the Wang line of personal computers.^{1/} Additionally, CAT furnished as part of its offer the standard Buy American Act (BAA) certificate (Federal Acquisition Regulation (FAR) § 52.225-1 (FAC 84-43)). The certificate provides that the end product to be furnished, except for those listed by the offeror, is a domestic end product. The firm did not list any end items of foreign manufacture. Under a separate solicitation clause for identification of the offeror's production point, CAT designated Barxon as the manufacturer of the barcode

^{1/}The RFP required that the barcode readers to be furnished had to interface with a particular group of Wang workstation models.

equipment and the production point as Vienna, Virginia. The descriptive literature furnished with CAT's offer was supplied by Barxon and gives two Virginia addresses. The contracting officer concluded that the CAT offer complied with all solicitation requirements. The contracting officer subsequently awarded on the basis of initial offers to CAT as the firm submitting the lowest priced offer.

After oral notification of the award and identification of Barxon as the equipment manufacturer, Barcode expressed its concern to the contracting officer that Barxon would not supply a domestic product and that Barxon might be enjoined from supplying the product under a court injunction issued for copyright infringement against Barxon as a result of a lawsuit filed by Barcode. Barcode subsequently filed its protest with our Office.

Barcode first argues that the agency improperly relied upon CAT's BAA certificate without further investigation of the question of whether CAT would furnish a product manufactured in the United States. In this regard, Barcode argues that CAT's proposed manufacturer, Barxon, will manufacture the barcode readers in Korea and alleges that the Barxon facility which is located in the United States is too small and has an insufficient number of employees to support the effort required under the subject contract. Barcode therefore argues that, had the contracting officer properly investigated the question prior to award, she would have discovered that Barxon will in fact manufacture the barcode readers in Korea, and she therefore would have been required to add an additional 10 percent to CAT's offer in evaluating its price. According to Barcode, had the contracting officer properly fulfilled her obligation to investigate the circumstances, she would have been required to make award to Barcode based on initial offers since the firm's technically acceptable offer was only approximately 2.4 percent higher than CAT's offer before application of the 10 percent evaluation preference.

The agency responds that it was not required to investigate the propriety of CAT's BAA certification since at no time prior to award did it have any information which would have led it to conclude that the firm intends to furnish a foreign end product. In this regard, the agency points out that CAT's offer shows that the firm is purchasing Barxon barcode readers and that they would be manufactured at Barxon's Vienna, Virginia facility. The agency also argues that, in any event, CAT has obligated itself to furnish domestic end products and that, to the extent that CAT does not in fact do so, it is a matter of contract administration not for consideration by this Office.

As a general rule, agencies should go beyond a firm's self-certification for BAA purposes and should not rely upon the facial validity of that certification where the agency has reason to believe, prior to award, that a foreign end product will be furnished. See, e.g., Autospin, Inc., B-233778, Feb. 23, 1989, 89-1 CPD ¶ 197. Where a contracting officer has no information prior to award which would lead to the conclusion that the product to be furnished is a foreign end product, the contracting officer may properly rely upon an offeror's self-certification without further investigation. Designware, Inc., B-221423, Feb. 20, 1986, 86-1 CPD ¶ 181.

In this case, the record shows that at no time prior to award did the contracting officer have any information which would have suggested that the barcode readers to be furnished by CAT were of foreign origin. CAT's offer provided that the barcode readers would be manufactured at the Barxon facility in Vienna, Virginia. The offer took no exception to the domestic product certificate, and the Barxon descriptive literature listed two Virginia addresses. The protester asserts that the CAT offer contains several different addresses for Barxon, that the two addresses on the descriptive literature are clearly office suites in commercial business areas and thus should have raised the contracting officer's suspicions. However, the Vienna, Virginia location contained in the point of production clause is different from the addresses listed in the descriptive literature, and, thus, we do not think the other addresses which were apparently sales offices should have raised concerns regarding the production or manufacturing point. There was no evidence in CAT's offer to indicate that its product was other than domestic.^{2/} Whether the awardee does in fact furnish a foreign end product under its contract in violation of its BAA obligation is a matter of contract administration not for consideration by our Office. 4 C.F.R. § 21.3(m)(1) (1990); Autospin, Inc., supra.

Barcode also argues that the Barxon BX-100-WL barcode reader had not been formally announced for marketing purposes prior

^{2/} Apparently, in response to Barcode's inquiry to the contracting office after award, the contracting officer did obtain Barxon's letter to CAT explaining how its product met BAA requirements. This letter contains a list of domestic components and an explanation of the work performed in the United States which represent more than 51 percent of the unit cost.

to the closing date for the submission of initial offers as required by the RFP. According to the protester, the descriptive literature furnished by CAT identifies the BX-110 and BX-120, not the BX-100-WL being offered by CAT. The protester argues that Barxon did not announce the BX-100-WL for marketing prior to the closing date of the RFP.

The agency relies on the statement in CAT's offer that the Barxon BX-100 series of barcode readers has been in production for approximately 1 year and that the Barxon BX-100 WL was recently announced for use with the Wang line of personal computers as well as an explanation in the offer by Barxon concerning the BX-100 WL's capability to interface with Wang computers.

The record shows that the agency reviewed the CAT offer for technical acceptability and accepted the statement in the offer that the model for use with the Wang line had been formally announced prior to the closing date. Since the VA found CAT's offer, including the equipment proposed, to be acceptable, it had no reason either to question the representation that the specific model had been "recently announced" or to require evidence to support the statement that the BX-100-WL had been announced for application to Wang workstations prior to the closing date for the receipt of offers. The solicitation did not require corroborative evidence, and there is nothing in the record to contradict the announcement. Under these circumstances, we deny this basis of protest.

Finally, Barcode alleges that CAT is nonresponsible because the firm will allegedly be violating Barcode's copyright for software necessary to the functioning of the barcode readers to be furnished.

We dismiss this aspect of Barcode's protest. The contracting officer advises that she was unaware of the injunction against Barxon for violating Barcode's copyright. However, the contracting officer, based on her subsequent investigation, believes that the Barxon product line proposed is not covered by the injunction and that her award decision was correct. Our Office does not generally review affirmative determinations of responsibility absent allegations of bad faith or fraud on the part of contracting officials or a failure to apply definitive responsibility criteria contained in a solicitation, 4 C.F.R. § 21.3(m)(5), and Barcode has made no allegation of bad faith or fraud. In any event, an allegation concerning a breach of copyright is essentially a private party dispute which

cannot be adjudicated by this Office. Alden Films,
B-233301, Nov. 1, 1988, 88-2 CPD ¶ 425. This matter is for
resolution by the courts, and this Office will not review
the effect of such allegedly improper actions. Id.

The protest is denied in part and dismissed in part.

for Robert P. Hinchman
James F. Hinchman
General Counsel