



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cryptek, Inc.
File: B-241354
Date: February 4, 1991

Richard J. Conway, Esq., Dickstein, Shapiro & Morin, for the protester.

Robert H. Robertson, for Ilex Systems, Inc., an interested party.

Carl J. Peckinpaugh, Esq., Department of the Air Force, for the agency.

Robert C. Arsenoff, Esq., and John G. Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office has no legal basis upon which to question the award where agency required verbal confirmation of awardee's Buy American Act certification that its facsimile machines were domestic end products in view of the fact that the protester's preaward allegations that these machines were foreign were not substantiated.

DECISION

Cryptek, Inc. protests the award of a contract to Ilex Systems, Inc., under request for proposals (RFP) No. F49642-90-RA021, issued by the Department of the Air Force for 18 TEMPEST-certified facsimile (fax) machines. The protester contends that Ilex offered a foreign end product for purposes of the Buy American Act, 41 U.S.C. § 10a et seq. (1988).

We deny the protest.

The RFP was issued on June 22, 1990, on a brand name or equal basis, specifying Cryptek's model 1094 and Ilex's model 750T. Award was to be made to the low priced technically acceptable offeror. Of the five offers received by the amended August 24 closing date, Ilex's was low at \$125,460 and Cryptek's was

050507/ 143084

second low at \$145,926.^{1/} Award was made to Ilex, but performance was stopped pending our decision.

The solicitation contained the clause set forth at Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7006, which implements the Buy American Act and provides for the addition of an evaluation differential to offers proposing to furnish foreign end products when they are in competition with offers of domestic end products.^{2/} A domestic end product is defined as an "end product manufactured in the United States if the costs of its . . . components which are . . . produced or manufactured in the United States exceeds fifty percent (50%) of the cost of all its components."

The RFP also required offerors to certify whether the end products that would be furnished were domestic or not. See Federal Acquisition Regulation (FAR) § 52.225-1. Both offerors certified that their fax machines were domestic.

In the cover letter to its proposal, Cryptek included the following statement:

"Evidence has been submitted to the GSA Board of Contract Appeals (Case No. 10680-P) that the Ilex model 750T frequently offered under RFPs for this type of equipment does not meet the requirements of the Buy American Act as a domestic end product Analysis of the parts content of the Ilex unit indicates that domestic parts represent less than 50% of the total parts costs. Parts cannot include labor and testing cost. . . . The GSBGA is due to deliver an opinion on the Ilex Buy American contention by the end of August. There is, therefore, probable cause to consider any certification by Ilex that their product is a domestic end product as incorrect."

^{1/} These prices are below the 1990 dollar threshold of \$172,000 established for application of the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501 et seq. (1988). See 55 Fed. Reg. 185 (1990).

^{2/} The differential to be applied ranges from 6 percent of the offered price inclusive of duty to 50 percent of the offered price exclusive of duty, whichever results in the greater evaluated price. See DFARS § 225.105. Neither Ilex nor the agency disputes that the awardee's price would not be low with application of the differential.

The General Services Administration Board of Contract Appeals (GSBCA) protest referred to was filed by Cryptek in conjunction with another Air Force procurement of fax machines. According to the protester the "evidence" referred to includes materials regarding the Ilex model 750T which have been subject to a protective order of the GSBCA since June 27. The "analysis" referred to in the proposal letter was prepared by Cryptek itself, is not subject to the protective order, but was never provided to the contracting officer until Cryptek filed its conference comments in this protest on November 26. GSBCA dismissed Cryptek's protest for lack of jurisdiction, Cryptek, Inc., GSBCA No. 10680-P, Aug. 27, 1990; subsequent motions for reconsideration were denied, Cryptek, Inc., GSBCA No. 10680-P-R, Oct. 24, 1990 and Nov. 6, 1990.

The agency reports that because of the Cryptek letter, on August 28 the contract specialist telephoned two Ilex officials who confirmed that the Buy American Act certification in the firm's proposal was correct. Subsequently, a Cryptek sales representative called both the contract specialist and the contracting officer with regard to the Ilex machine. While recollections differ about whether the contracting officer requested the Cryptek representative to provide additional information--the agency representing that the request was made--it is clear that the protester provided no additional information to the Air Force regarding Ilex prior to the September 20 award date.

Cryptek bases its challenge to the Ilex model 750T on "information and belief" that the costs of its domestic components do not amount to 50 percent of the total cost of all components; this position is premised on the protester's assertion that the primary component of the TEMPEST-certified machine is a standard Japanese fax machine which is purchased by Ilex and modified and to which additional components are added to meet security requirements. Since materials before the GSBCA have not been provided for our review, the protest is predicated on the protester's own in-house analysis of the Ilex machine. Cryptek has requested that we review its position in light of the in-house analysis and a bill of materials, which has been provided by Ilex for our in camera review.

Cryptek also asserts that the information provided in the cover letter to its proposal was sufficient to place the contracting officer on notice that Ilex was offering a foreign end product. The protester argues that, therefore, the contracting officer was obligated to conduct a thorough investigation of the awardee's Buy American Act certification. Cryptek also argues that, by calling the Ilex representatives on August 28, such an investigation was in fact begun by the

agency but contends that it was "woefully inadequate" because it consisted solely of a verbal confirmation of the correctness of the certification.

As a general rule an agency should go beyond a firm's self-certification for Buy American Act purposes and should not rely upon the validity of that certification where the agency has reason to believe, prior to award, that a foreign end product will be furnished. American Instrument Corp., B-239997, Oct. 12, 1990, 90-2 CPD ¶ 287. 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. Id. Following award, whether an offer does in fact furnish a foreign end product in violation of its certification is a matter of contract administration. Barcode Indus., Inc., B-240173, Oct. 16, 1990, 90-2 CPD ¶ 299.

The statement contained in the cover letter to Cryptek's proposal referenced pending litigation on another procurement, but it provided no details concerning that litigation and no details concerning the protester's in-house analysis of the Ilex machine. Without more, such unsupported allegations that a competitor's product is not in compliance with its Buy American Act certification do not impose an obligation on the contracting officer to conduct a detailed investigation behind that certification as the protester contends. Here, the contracting officer did, however, take some action; she contacted the awardee's representatives and sought their confirmation that the offered item was in fact in compliance with the Buy American Act certification. The contracting officer could have requested a cost breakdown or other evidence of compliance from Ilex; on the other hand, the protester put forth no effort to substantiate its allegation.

Under these circumstances, we believe that the contracting officer's actions were commensurate with the level of detail provided by the protester with regard to its allegations; in view of this and since there is nothing in the record which shows that there was any other information to suggest that Ilex was offering a foreign end product available to the contracting officer at the time of award, we have no legal basis upon which to question the award to Ilex.

Finally, as a result of this post-award protest, the Air Force is now in possession of Ilex's bill of materials, which purports to demonstrate that the firm's model 750T is a domestic end product for Buy American Act purposes. A preliminary review of Ilex's documentation indicates that further analysis and inquiry are required to determine whether the awardee's conclusions are, in fact, correct. Performance

of the contract has been stayed and we understand that the agency plans to review the Buy American Act status of the awardee's machine.

The protest is denied.


for James F. Hinchman
General Counsel