



Comptroller General  
of the United States  
Washington, D.C. 20548

Bednarz  
145291

## Decision

**Matter of:** Hung Myung (USA) Ltd., Inc.; Containertechnik  
Hamburg GmbH & Co.

**File:** B-244686; B-244686.2; B-244686.4; B-244687;  
B-244688

**Date:** November 7, 1991

John K. Hobbs for Hung Myung (USA) Ltd., Inc., and A. Wayne Lalle, Jr., Esq., Graham & James, for Containertechnik Hamburg GmbH & Co., the protesters.  
John J. Blanchard, Esq., and Alan W. Mendelsohn, Esq., Department of the Navy, for the agency.  
Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Agency reasonably classified general purpose, general cargo containers within a Federal Supply Classification group subject to the Trade Agreements Act; such containers are not war materials or purchases indispensable for national security or national defense purposes exempt from the Act's application.
2. Agency reasonably exercised its discretion not to process a "national interest" waiver to the provisions of the Trade Agreements Act, where the agency received acceptable offers of domestic and eligible products.
3. Agency properly determined proposals offering nondesignated country end products (Korea and Poland, respectively) on a procurement, for which the Trade Agreements Act is applicable, were unacceptable and eliminated them from the competitive range.
4. Where agency properly eliminated protester from the competitive range, protester is not an interested party to protest the award to another offeror.

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## DECISION

Hung Myung (USA) Ltd., Inc. and Containerteknik Hamburg GmbH & Co. protest the application of the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2582 (1988), to requests for proposals (RFP) Nos. N00033-91-R-3103 (-3103), N00033-91-R-3119 (-3119), and N00033-91-R-3120 (-3120), issued by the Department of the Navy, Military Sealift Command (MSC), for the purchase of three types of containers.<sup>1</sup>

We deny the protests in part and dismiss them in part.

On February 25, 1991, MSC received a request for the purchase of 1,000 containers (later expanded to 9,000 containers) for initial short-term use in the redistribution of ammunition currently in southwest Asia. MSC synopsisized this requirement in the Commerce Business Daily (CBD) on March 1, 1991, and notified prospective offerors on April 12, 1991, of its intent to acquire 1,000 containers for the transportation of munitions.

The U.S. Army Belvoir Research, Development and Engineering Center forwarded the Commercial Item Descriptions (CID) for the containers on May 9, 1991. The CIDs categorized the containers under Federal Supply Classification (FSC) code 8115, "Boxes, Cartons, and Crates," rather than FSC 8140, "Ammunition and Nuclear Ordnance Boxes, Packages, and Special Containers." The RFP specifications were based upon these CIDs.

RFP -3103, issued on May 20, 1991, was for 1,500 side opening containers; RFP -3119, issued on May 28, 1991, was for 6,000 end opening containers; and RFP -3120, issued on June 7, 1991, was for 1,500 half-height containers. Each solicitation advised offerors that the Trade Agreements Act applied to the procurement.

The Trade Agreements Act authorizes the President to waive all buy-national laws, regulations, or procedures for the acquisition of eligible products from any country designated as a reciprocating, signatory nation to a recognized agreement or as a least developed country. 19 U.S.C. § 2511. In order to encourage trade agreements with additional countries for reciprocal procurement opportunities, the Act also requires the President to prohibit the procurement of eligible products from foreign countries not designated pursuant

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<sup>1</sup>Containerteknik's protest is limited to the application of the Trade Agreements Act to RFP -3103.

to the Act. The list of countries designated under the Trade Agreements Act appears at Federal Acquisition Regulation (FAR) § 25.401 (FAC 90-4). Agency heads are authorized to waive the prohibition on a case-by-case basis when in the national interest. 19 U.S.C. § 2512(b).

With respect to the implementing regulations of the Department of Defense (DOD), the Trade Agreements Act only applies to those eligible product groups listed by FSC code in DOD FAR Supplement (DFARS) § 225.403-70. See DFARS § 225.402(c). FSC 81, "Containers, Packaging and Packing Supplies," is among the listed eligible product groups; however, FSC 8140 "ammunition containers" are specifically exempted from Trade Agreements Act coverage.

MSC classified the three types of containers at issue under FSC 8115, which made the procurements subject to the Trade Agreements Act and meant that products from nondesignated countries would be unacceptable. MSC found the offers of Hung Myung and Containerteknik on RFP -3103 to be for products of nondesignated countries, Korea and Poland, respectively, and eliminated these offers from the competitive range.

With regard to RFP -3103, Hung Myung and Containerteknik protested to our Office that the proper classification of the containers was FSC 8140, which would remove this procurement from the Trade Agreements Act and permit competition by nondesignated countries. Hung Myung alternatively argues that MSC should have waived the application of the Act under applicable regulations. Containerteknik also protests that, in fact, it offered products of a designated country under RFP -3103 and that MSC should not have eliminated its offer from the competitive range. In addition, Containerteknik argues that the award of a contract under RFP -3103 to American Coastal Industries was improper, in that the awardee failed to satisfy a definitive responsibility criterion. Hung Myung also protested the application of the Trade Agreements Act in RFPs -3119 and -3120 prior to the amended closing date for receipt of initial proposals.

As an initial matter, we note that Hung Myung's and Containerteknik's protests as to RFP -3103 are untimely under our Bid Protest Regulations, insofar as they concern the applicability of the Trade Agreements Act. RFP -3103 expressly advised offerors of the agency's intent to apply the Trade Agreements Act to this procurement. The first amendment of the RFP specifically addressed the supply classification of the containers, stating that they were cargo containers subject to the Act, not exempted ammunition

containers.<sup>2</sup> Protests based upon alleged solicitation improprieties must be filed prior to the time set for receipt of initial proposals, 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). Since the agency's intention to apply the Trade Agreements Act to RFP -3103 was apparent from the face of the solicitation, the protesters' failure to file prior to the time set for receipt of proposals renders their protests untimely. Thus, this aspect of the protests is dismissed as untimely. Nevertheless, the following analysis and the applicability of the Trade Agreements Act to RFPs -3119 and -3120 apply equally to RFP -3103.

Hung Myung did timely protest the applicability of the Trade Agreements Act to RFPs -3119 and -3120 prior to the amended closing date. Hung Myung claims that the Navy misclassified the end opening and half-height containers as general purpose FSC 8115 containers. Hung Myung argues that the containers' initial use in munitions transportation dictates an FSC 8140 "ammunition container" classification.

The Navy argues that FSC 8140, as defined by the Defense Logistics Agency (DLA) Cataloging Handbook, includes only containers "which are specifically designed for the storage, handling, and shipping of ammunition," and that the design of the requested containers is not specific to munitions cargo. Although it is true that the containers are suitable for the transportation of ammunition when new, the containers have a 10-year life and are intended for general cargo transportation after their initial use.

The determination of the appropriate FSC for a particular item is within the discretion of the procuring agency, utilizing the guidance provided by the General Services Administration and the DLA, the agencies responsible for maintaining the FSC system. Cincinnati Milacron Mktg. Co., B-237619, Feb. 27, 1990, 90-1 CPD ¶ 241. We will not disturb an agency's determination as to the appropriate FSC unless it lacks a reasonable basis. Id.

Here, the RFPs in question specify that the containers must conform to the requirements for "general purpose, general cargo" containers, as provided by the International Organization for Standardization (ISO) 1496/1. The item description in each RFP generically requires the containers to be noncollapsible, of a permanent character, and suitable for

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<sup>2</sup>Moreover, at the pre-proposal conference attended by Hung Myung's and Containerteknik's representatives, counsel for the agency explained the application of the Act and expressly stated that the Act prohibited the acceptance of Korean containers.

repeated use. There are no performance specifications relative to a particular form of cargo.

In contrast, the Navy has provided us with specifications for load and roll pallets, which are classified as FSC 8140 ammunition containers. The item description and the performance specifications for the ammunition containers is specifically crafted with respect to the intended cargo, requiring, for instance, that the pallets allow the loading and securement of four military launch rocket system pods, and provide appropriate restraint provisions. We are not persuaded that the end opening and half-height containers are similarly designed for specific munitions cargo, notwithstanding Hung Myung's assertion that the spacing between crossmembers and the minimum width exceeds the dimensions for general purpose, general cargo containers contained in ISO 1496/1. Moreover, the CIDs for these containers, which served as the basis for the RFP specifications and which were available for unlimited public distribution, clearly designated FSC 8115 as the applicable classification. Based upon our review of the record, the RFPs required FSC 8115 containers, the acquisition of which falls under the Trade Agreements Act, not FSC 8140 ammunition containers.

Hung Myung argues that the request for "ammunition containers" in the CBD announcement and facsimile pre-solicitation notice to prospective offerors justified the presumption that the agency issued the RFPs under FSC 8140, in the absence of a contrary classification. We disagree. A CBD announcement is not the equivalent of a formal solicitation and, in our view, does not lock an agency into all of the product's advertised features. See AZTEK, Inc., B-236612, Dec. 6, 1989, 89-2 CPD ¶ 521. The RFPs, which alone represent the government's minimum needs, do not refer to "ammunition containers" or to an FSC 8140 classification. Thus, we cannot say that the RFP's classification of these containers was erroneous.

Hung Myung argues in the alternative that the containers are exempt from the Act under FAR § 25.403(d)(1), even assuming the containers are properly classified as FSC 8115. This provision excludes otherwise eligible products from the Act's application if they are "arms, ammunition, or war materials, or purchases indispensable for national security or national defense purposes." Hung Myung argues that the containers meet this exception because of their initial use to ship munitions from southwest Asia. Hung Myung also argues that the containers must be indispensable for national security or national defense purposes owing to MSC's finding that urgent and compelling circumstances

required the award of the contracts and commencement of these shipments, notwithstanding these protests.<sup>3</sup>

First, we note that FAR § 25.403(d)(1) vests in DOD the discretion of whether particular purchases fall under this exception. DFARS § 225.403(d)(1) provides procedures for approval of such exceptions on a case-by-case basis. We will not question DOD's exercise of discretion under this regulation unless it lacks a reasonable basis.

DOD applies the FAR § 25.403(d)(1) exemption for "arms, ammunition, or war materials" by not listing such items on the list of eligible products at DFARS § 225.403-70. The DFARS list does not include any items of arms, ammunition, or war materials, even to the exclusion of FSC 8140 "ammunition containers." Thus, by definition, FSC 8115 containers are not "war materials."

We are also not persuaded by Hung Myung's argument that MSC's finding of urgent and compelling circumstances regarding these procurements demonstrates the containers' indispensability to the national security or national defense. An agency's urgency determination need not relate to national security or national defense concerns, nor does the record here indicate that such concerns motivated MSC's urgency determinations. Thus, we will not question MSC's failure to process this acquisition as an exception to the Trade Agreements Act.

In its comments on the agency report, Hung Myung raises various additional legal arguments in support of its contention that the Trade Agreements Act does not apply to these procurements.<sup>4</sup> The protester appears to be clearly wrong

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<sup>3</sup>The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(c)(2) (1988), allows agencies to proceed with award in the face of pending protests if the head of the procuring activity makes a written determination that urgent and compelling circumstances will not permit waiting for the decision and discloses that determination to our Office. See Dock Express Contractors, Inc., B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23. MSC made such an urgency determination with respect to the procurements at issue here.

<sup>4</sup>Hung Myung's additional arguments include: (1) "[t]he Act does not cover procurement where the Buy American Act, and other defense equipment-peculiar regulations have been invoked"; (2) the containers being purchased will be used for transportation of military supplies and "[t]he Act was not meant to cover procurement in the transportation sector of the United States"; and (3) "[t]he Act was not meant to

with respect to these additional arguments. We decline to discuss them further because our Bid Protest Regulations do not contemplate the piecemeal presentation of protest issues. Armstrong Motorcycles Ltd., B-238436; B-238436.2, June 5, 1990, 90-1 CPD ¶ 531. A protester may not delay raising additional protest grounds, where, as here, the protester should have been aware of those grounds at the time of filing its initial protest. Id.

Hung Myung argues that, as to all three RFPs, MSC should have waived the Act's prohibition against purchases from nondesignated countries based upon the national interest. 19 U.S.C. § 2512(b)(2). In particular, Hung Myung cites the national interest exception provided in DFARS § 225.402(c)(1)(i), which allows the chief of the contracting office to waive the Act's prohibition where:

"(A) No offers of domestic or eligible products are received, or

"(B) offers of eligible products or domestic end products from responsive, responsible offerors are insufficient to fill the Government's requirements."

Hung Myung argues that these procurements warrant a national interest waiver because no offerors of domestic or eligible products were responsive to the government's delivery schedule. Hung Myung's argument is factually incorrect, as the agency has awarded contracts for the side opening and half-height containers to companies that satisfy the required delivery schedule and that offer domestic or designated country end products.

Hung Myung also claims that a second national interest waiver, contained in DFARS § 225.402(c)(1)(ii), should apply to these procurements. This regulation gives the head of the contracting activity discretion to waive the Trade Agreements Act "for purchases by overseas purchasing activities of products critical for support of U.S. forces stationed abroad." MSC is the purchasing activity conducting these procurements. MSC is located in Washington, D.C., and thus is not an "overseas purchasing activity." Thus, MSC properly determined not to process waivers of the Trade Agreement Act.

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cover end items not for delivery into the customs territory of the United States."



Since the containers in RFP -3103 were covered by the Trade Agreements Act, the Act's prohibition against competition by products of nondesignated countries was properly applied. Hung Myung admits that it manufactured its containers in Korea, a nondesignated country. Therefore, MSC could not accept Hung Myung's products and properly rejected its proposal from the competitive range. See generally Abt Assocs. Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223; Bulloch Int'l, Inc., B-237369, Feb. 5, 1990, 90-1 CPD ¶ 153.

Containertechnik, however, disputes the agency's determination that its containers were products of a nondesignated country, Poland, and asserts that they were products of a designated country, Germany.

FAR § 25.401 defines a "designated country end product" as an article that "has been substantially transformed into a new and different article of commerce" in a designated country, regardless of the origin of its components. While Containertechnik certified its proposed containers as designated country end products, test certificates included in its proposal indicated that Containertechnik had commissioned testing on prototype containers at a licensee's plant located in Poland. As the certificates indicated that Containertechnik had established its manufacturing process in Poland, a nondesignated country, MSC conducted discussions with the protester to verify the country of manufacture. Containertechnik did not attend the proposed meeting. The agency claims that the contracting officer nevertheless received confirmation by telephone that Containertechnik would manufacture the products in Poland using German components. On July 2, 1991, MSC informed Containertechnik that it would no longer consider its proposal for award because the offered containers would not be manufactured in a country designated under the Trade Agreements Act.

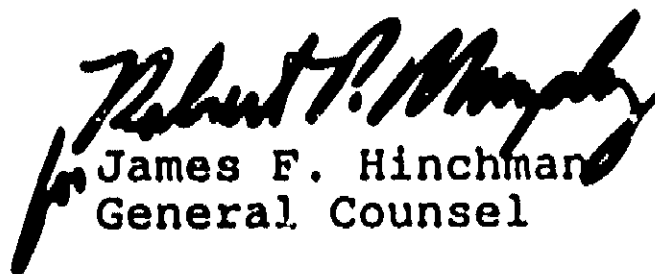
We think that MSC reasonably concluded, based on the information available to it, that Containertechnik's offered containers were nondesignated country end products. Indeed, Containertechnik only submitted evidence on the breakdown of its manufacturing process in its rebuttal to the agency report submitted in connection with this protest. Nothing in the record shows that Containertechnik was offering German end products. In this regard, Containertechnik states in its protest and in its comments that the materials for the containers are shipped to Poland "where they are processed by Polish labor and assembled." In the absence of evidence to the contrary, we think this makes the containers "end products" of Poland. See Becton Dickinson AcuteCare, B-238942, July 20, 1990, 90-2 CPD ¶ 55. Under the circumstances, MSC properly eliminated Containertechnik from the competitive range on RFP -3103. See Abt Assocs. Inc.; supra; Bulloch Int'l, Inc., supra.



Containertechnik protests the award of a contract for 250 side opening containers to American Coastal Industries under RFP -3103. We dismiss this aspect of the protest because Containertechnik is not an interested party to object to the award. Under CICA's bid protest provisions, only an "interested party" may protest a federal procurement, that is, an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a). A protester is not an interested party where it would not be in line for contract award were its protest sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7. As we have determined that MSC properly excluded Containertechnik from the competitive range of RFP -3103, Containertechnik would not be in line for award even if we sustained the protest on this point. Clean Air, Inc.--Recon., B-242582.2; B-242582.3, Apr. 24, 1991, 91-1 CPD ¶ 405. Thus, we dismiss this aspect of Containertechnik's protest.

Finally, Containertechnik protests MSC's determination that urgent circumstances associated with events in the Persian Gulf compelled a contract award on RFP -3103, notwithstanding the bid protests filed with our Office. Our Office has no jurisdiction to review an agency's urgency determination. All that is required for an agency to proceed with award in the face of pending protests with our Office is a written determination by the head of the procuring activity that urgent and compelling circumstances will not permit waiting for the decision and disclosure of that determination to our Office. 31 U.S.C. § 3553(c)(2); see also Dock Express Contractors, Inc., supra. MSC made such a written determination as to RFP -3103 on July 19, 1991, and advised our Office of that determination on July 25.

The protests are denied in part and dismissed in part.

  
for James F. Hinchman  
General Counsel