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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Oliver Products Company

File: B-245762

Date: January 7, 1992

Jack A. Siebers, Esq., and Thomas T. Kivell, Esq., Siebers & Kivell, P.C., for the protester.
Alan R. Yuspeh, Esq., Scott Arnold, Esq., and Mary A. Denise, Esq., Howrey & Simon, for NJCT Corporation, an interested party.
Philip F. Eckert, Jr., Esq., and Niketa L. Wharton, Esq., Defense Logistics Agency, for the agency.
Behn Miller, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that awardee has not complied with the Buy American Act requirement to furnish domestic product is dismissed where current evidence shows that awardee's machines are more than 50 percent comprised of domestic components, and contracting agency asserts that it will audit proposed bread slicing machines for Buy American Act compliance prior to acceptance of the items pursuant to its contract administration function.

DECISION

Oliver Products Company protests award to NJCT Corporation, under request for proposals (RFP) No. DLA400-91-R-4292, issued by the Defense General Supply Center, Defense Logistics Agency (DLA) as a small business set-aside for 21 bread slicing machines. The protester contends that NJCT intends to deliver a foreign end product for purposes of the Buy American Act, 41 U.S.C. § 10a et seq. (1988).

We dismiss the protest.

The solicitation contained the clause set forth at Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7000, which implements the Buy American Act. In this regard, 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 [50 percent] the cost of all its components." DFARS § 252.225-7001(a)(5). Under the Buy American Act certificate, offerors were to certify that, except as

otherwise indicated, each end product was a domestic source end product; any foreign end products were to be listed with the country of origin. See DFARS § 252.225-7000.

Proposals were received on July 12, 1991. In their proposals, both NJCT and Oliver left the Buy American Act certificate blank, thereby certifying, according to the language of the provision, that the product they offered was a domestic end product. Award was made to NJCT on September 13 as the low offeror. Oliver filed this protest with our Office on September 19.

In its protest, Oliver alleges that NJCT's offered product does not comply with the requirements of the Buy American Act since at least 50 percent of Oliver's bread slicing machine is comprised of foreign components. Oliver also contends that NJCT is not a small business. As explained below, we will not consider either ground of protest.

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. Cryptek, Inc., B-241354, Feb. 4, 1991, 91-1 CPD ¶ 111. 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 offeror does in fact furnish a foreign end product in violation of its certification is a matter of contract administration. LSL Indus., Inc., B-237710, Mar. 6, 1990, 90-1 CPD ¶ 254.

In this case, the record shows that in June 1990, under a prior procurement, a post-award audit conducted by DLA revealed that the NJCT bread slicing machine model was in violation of the Buy American Act; at that time, because NJCT had already fully performed and delivered the contract, no agency action was taken against NJCT. Apparently, the current contracting officer for this procurement was not aware of this prior violation.¹

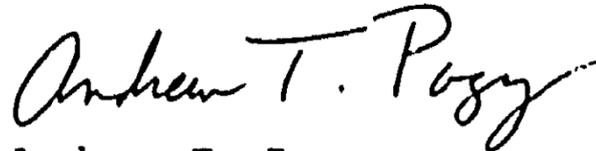
However, in response to this protest, the agency has requested--and received--additional documentation (cost breakdown) from NJCT which shows that NJCT's bread slicing

¹After reviewing the agency report, Oliver has timely filed a supplemental protest against the contracting officer's responsibility determination which we will address in a separate decision.

machine is a valid Buy American Act end product.² Additionally, DLA has informed this Office that before it accepts any items from NJCT, it will conduct a full audit of the bread slicing machines to determine whether the majority of its components--as represented by NJCT--are domestically produced or manufactured. Since the evidence in the agency's possession currently shows NJCT's proposed compliance with the Buy American Act, we see no basis to disturb the award. However, we expect the agency to conduct a rigorous investigation of the items prior to acceptance pursuant to its contract administration function. Accordingly, we dismiss this protest since it is a matter of contract administration. 4 C.F.R. § 21.3(m)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991).

We also dismiss Oliver's protest that NJCT is not a small business. The Small Business Act, 15 U.S.C. § 637(b)(6) (1988), gives the Small Business Administration, not our Office, the exclusive authority to determine matters of small business size status for federal procurements. 4 C.F.R. § 21.3(m)(2); Advanced Support Sys. Mgmt., Inc., 70 Comp. Gen. 255 (1991), 91-1 CPD ¶ 170.

The protest is dismissed.



Andrew T. Pogany
Acting Assistant General Counsel

²DLA provided this documentation in camera to our Office.

³Oliver also implies that NJCT is not a regular dealer or manufacturer within the meaning of the Walsh-Healy Act, 42 U.S.C. §§ 34-45 (1988). Our Office does not consider protests against a contractor's Walsh-Healy legal status. 4 C.F.R. § 21.3(m)(9); Herley Indus., Inc., B-242903, May 8, 1991, 91-1 CPD ¶ 449.