



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

145671

Decision

Matter of: Military Optic, Inc.
File: B-245010.3, B-245010.4
Date: January 16, 1992

Randall E. Kuy, Esq., Gray, Cary, Ames & Frye, for the protester.
Bradley J. Crosson, Esq., and Christopher E. Kernan, Esq., Department of the Army, for the agency.
David H. Carls, Esq., General Counsel for Corion Corporation, interested party.
Jeffrey S. Forman, Esq., Office of the General Counsel, GAO, participated in the preparation of this decision.

DIGEST

1. Protester's bid was subject to Buy American Act differential where cost of qualifying components of its end product did not exceed by 50 percent cost of nonqualifying foreign country components. In determining applicability of Buy American Act differential, agency properly excluded such items as overhead and profit from protester's qualifying component cost.
2. The fact that a manufacturer of a domestically manufactured end product may be foreign owned is not a factor to be considered in determining whether to apply the Buy American Act differential.

DECISION

Military Optic, Inc., protests the award of a contract to Corion Corporation under invitation for bids (IFB) No. DAAA09-91-B-0262, issued by the U.S. Army Armament Munitions and Chemical Command for laser filtered binoculars. Military Optic maintains that the Army improperly displaced it as the low bidder by applying a 50 percent Buy American Act differential to its bid. Military Optic also alleges that the contracting officer demonstrated bias because the 50 percent differential should have been, but was not added to Corion's bid.

We deny the protest.

The IFB specified a basic requirement for 20,040 M22 laser filtered binoculars and an evaluated option for increased quantity. The low bidder was to be determined by adding the total price for the evaluated option to the total price for the basic requirement. The IFB included a clause required by regulations implementing the Buy American Act, 41 U.S.C. §§ 10a-10d (1988), which provided that each offer of a nonqualifying foreign country end product would be adjusted for the purpose of evaluation by adding 50 percent of the offer, inclusive of duty. See Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7001, 56 Fed. Reg. 9088 (March 4, 1991), to be codified at 48 C.F.R. § 252.225-7001.

Military Optic and five other companies submitted bids, with Military Optic being the apparent low bidder. Upon review of each bid, however, the contracting officer determined that Military Optic and one other company would be supplying a nonqualifying foreign country end product, thereby subjecting their bids to the 50 percent differential. When the 50 percent differential was added to its bid, Military Optic dropped to fifth lowest out of the six bids and Corion became the low bidder.

Military Optic concedes that its bid indicated the binocular it proposed to supply before addition of the laser filter was from Japan, a nonqualifying country under the Buy American Act. However, it contends that, as certified in its bid, it would supply a domestic end product for purposes of the Act because its final product with laser filter would be manufactured in the United States, and more than 50 percent of its total cost was attributable to the manufacturing process taking place in the United States.

In calculating its nonqualifying foreign country component cost, Military Optic used the price it had paid for the foreign component, the binocular without laser filter. In calculating its qualifying component cost, Military Optic included the direct and indirect costs it incurred in purchasing the laser filter and assembling the end product in the United States. For example, it included as qualifying component costs such items as engineering, overhead, and profit.

For purposes relevant here, DFARS § 252.225-7001(a)(6)(ii) 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 . . . manufactured in the United States exceeds 50 percent of the cost of all its components."

Assembly of the nonqualifying binocular component and the qualifying laser filter component in the United States constitutes manufacture for purposes of the Act and could potentially result in a domestic end product. See Saginaw Machine Systems, Inc., B-238590, June 13, 1990, 90-1 CPD ¶ 554; Imperial Eastman Corporation; Thorsen Tool Company, 53 Comp. Gen. 726 (1974), 74-1 CPD ¶ 153. However, under DFARS § 252.225-7001(a)(6)(ii), supra, the cost of the qualifying components incorporated into the end product must constitute more than 50 percent of the cost of all components.

While the detailed cost information is proprietary, it is clear from the record before us that Military Optic's qualifying component cost was less than 50 percent of the cost of all components. In this regard, the agency properly excluded from Military Optic's qualifying component cost its direct and indirect costs in assembling the end product, such as engineering, overhead and profit. A. Hirsh, Inc., 69 Comp. Gen. 307 (1990), 90-1 CPD ¶ 247; Ampex Corporation, B-203021, Feb. 24, 1982, 82-1 CPD ¶ 163.¹ Consequently, the contracting officer correctly applied the Buy American Act differential to Military Optic's bid.

After receiving the Army's administrative report and reviewing the initial preaward survey, Military Optic raised as an additional basis of protest that Corion was itself offering a Japanese end product. In reaching this conclusion, the protester relied primarily on the fact that although the assembly of the components was to take place in a domestic plant, the plant was entirely owned by a Japanese corporation. Therefore, according to Military Optic, Corion's bid should have been subjected to the Buy American Act differential, and the agency's failure to do so demonstrates bias.

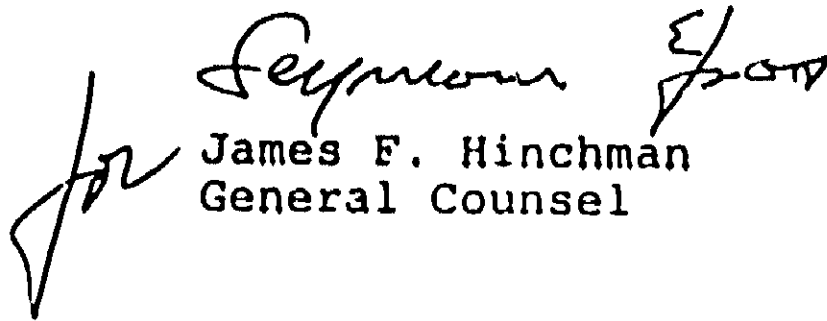
The fact that the manufacturer of a domestically manufactured end product may be foreign owned is not a factor to be considered in determining whether to apply the Buy American Act differential. See Lemmon Pharmacal Company, B-186124, Aug. 2, 1976, 76-2 CPD ¶ 110. With this in mind, it becomes clear that there is no evidence in the record to support this allegation of bias. Indeed, the contracting officer was concerned that Corion would be supplying a domestic end product and requested a

¹A bidder may include direct and indirect manufacturing costs of the qualifying components only when the bidder itself is fabricating components that make up the end item. 50 Comp. Gen. 697 (1971). Military Optic did not manufacture the qualifying components of its laser filtered binoculars.

supplemental detailed preaward review of Corion's compliance with its Buy American Act Certification. It was only after the contracting officer reviewed this data with its detailed cost breakdowns and other relevant materials in his file that he concluded that Corion was supplying a domestic end product not subject to a Buy American Act differential.

Thus, the agency did not treat Military Optic any different than Corion. Rather, the agency treated them identically, and in regard to the bids of both companies, the agency fulfilled its responsibility to look beyond a firm's self certification in appropriate circumstances. See A & D Machinery Company, B-242546; B-242547, May 16, 1991, 91-1 CPD ¶ 473.

Accordingly, the protest is denied.


James F. Hinchman
General Counsel