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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Oceanic Electrical Mfg. Co., Inc.

File: B-249432; B-249432.2

Date: August 19, 1992

Patricia H. Wittie, Esq., Kirkpatrick & Lockhart, for the protester.

Richard J. Leidl, Esq., and Elizabeth H. Lefebvre, Esq., Reid & Priest, for SPD Technologies, Inc., an interested party.

Eric A. Lile, Esq., and Kim Churchill, Esq., Department of the Navy, for the agency.

Richard P. Burkard, Esq., and John W. Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against solicitation requirement that offerors provide a particular component and that the component be manufactured in the United States is untimely where protest is filed after the closing date for receipt of proposals.

2. The General Accounting Office will not review an agency determination not to waive "Buy American" restriction since the statute and regulations setting forth the restriction vest discretion regarding such waivers within the head of the agency and the determination involves balancing the goals of the restriction and foreign policy considerations.

DECISION

Oceanic Electrical Mfg. Co., Inc. protests the rejection of its proposal under request for proposals (RFP) No. N00406-92-R-0020, issued by the Department of Navy for switchgear assemblies. These switchgears require the incorporation of air circuit breakers, which are subject to a statutory and regulatory requirement prohibiting the Navy from purchasing these items unless they are manufactured in the United States. 10 U.S.C. § 2507(f) (Supp. II 1990); Defense Federal Acquisition Regulation Supplement (DFARS) § 252.7016. Oceanic argues that (1) the Navy should provide the air circuit breakers as government-furnished equipment, (2) the requirement for U.S.-manufactured air circuit breakers does not apply to this solicitation, and (3) the agency improperly refused to grant a waiver of this requirement.

We dismiss the protest.

The RFP was issued on January 6, 1992, and amended to incorporate DFARS § 252.225-7029 which provides as follows:

"RESTRICTION ON ACQUISITION OF AIR CIRCUIT BREAKERS (DEC, 1991)

"(a) All air circuit breakers for naval vessels provided under this contract shall be manufactured in the United States and the cost of their U.S. components must exceed 50 percent of the cost of all their components.

"(b) If compliance with this restriction will have an adverse effect on a U.S. company, the Offeror/Contractor may request a waiver."

Oceanic and three other firms submitted requests for waivers of this restriction. Concerning the Navy's authority to waive the restriction, DFARS § 225.7016-3 provides as follows:

"[T]he Secretary of the Navy and the Director of the Defense Logistics Agency may waive the restriction on a case-by-case basis if it is determined that applying the restriction in a proposed acquisition--

"(a) Is not in the national security interests of the United States;

"(b) Will have an adverse effect on a U.S. company; or

"(c) Will result in purchase from a U.S. company that, with respect to the sale of air circuit breakers for naval vessels, fails to comply with applicable Government procurement regulations or the anti-trust laws of the United States."

While its waiver request was pending, Oceanic submitted its proposal by the April 17 closing date for receipt of proposals. Oceanic's proposal included three alternate prices: (1) based on an offer of foreign-manufactured air circuit breakers; (2) based on an offer of air circuit breakers manufactured in the United States; and (3) based on government-furnished air circuit breakers. On July 13, the

Navy denied the waiver request. Oceanic filed this protest on July 15. On July 29, pursuant to 31 U.S.C. § 3553(c)(2) (1988), the head of the contracting activity authorized award of the contract because urgent and compelling circumstances significantly affecting the interests of the United States will not permit waiting for our decision.

The protester argues initially that the agency should provide the air circuit breakers to the awardee as government-furnished equipment. A protest based upon alleged improprieties in a solicitation which are apparent from the solicitation must be filed prior to the time set for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1992). Here, the solicitation required offerors to furnish air circuit breakers. Since Oceanic's protest against that requirement was filed nearly 3 months after the closing date, it is untimely and will not be considered.

Next, Oceanic contends that the statutory and regulatory restriction at issue pertains to air circuit breakers and does not apply to this procurement since the Navy is procuring switchgear assemblies. This argument also is untimely. The solicitation as amended stated that, absent a waiver, the Navy would not accept air circuit breakers not manufactured in the United States. If it objected to the incorporation of this restriction into the RFP, Oceanic was required to protest this provision not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1). Since it did not, we will not consider this argument.

Oceanic also objects to the Navy's refusal to grant a waiver of the prohibition on purchases of nondomestic air circuit breakers. The protester contends that imposition of the restriction in this procurement will result in a violation of procurement regulations and the antitrust laws of the United States.

The legislation limiting the acquisition to domestic air circuit breakers vests the head of the agency with the discretion and authority to waive the requirement in issue. In view of that discretion, and because such decisions often involve balancing the goals of the legislation and foreign policy to determine the public interest, we will not review the decision. See Schlick Am., Inc., B-242165, Apr. 4, 1991, 91-1 CPD ¶ 350; General Motors of Canada Ltd., B-212884, Oct. 7, 1983, 83-2 CPD ¶ 427; Rudel Mach. Co., Inc., B-224606, Nov. 6, 1986, 86-2 CPD ¶ 529.

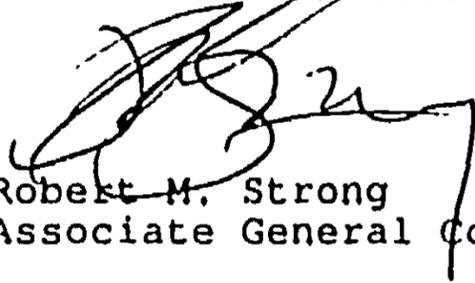
We point out, however, that the Office of the Assistant Secretary of the Navy, in connection with the waiver request, recommended that in future procurements, the Navy

request alternate bids, inclusive and exclusive of the air circuit breakers. If the air circuit breakers are the determinative factor in the evaluation, it recommended that the Navy consider breakout of the air circuit breakers.

Finally, on August 10, Oceanic filed an additional protest objecting to the agency's finding that urgent and compelling circumstances require it to proceed with award.

We dismiss Oceanic's supplemental protest because we do not review such determinations. Banknote Corp. of Am., Inc., B-245528; B-245528.2, Jan. 13, 1992, 92-1 CPD ¶ 53. When an agency makes a determination to proceed with award of a contract while a protest is pending, the agency's only obligation is to advise our Office of that decision. See 31 U.S.C. § 3553(d)(2) (1988); Federal Acquisition Regulation § 33.104(b).

The protest is dismissed.



Robert M. Strong
Associate General Counsel

In its supplemental protest, Oceanic also repeated its allegation in its initial protest that the agency's failure to grant the waiver results in a violation of antitrust laws. Since we will not review the agency's decision not to waive the requirement, which included consideration of antitrust laws, we will not consider this issue. In any event, allegations of restraint of trade and possible violations of antitrust laws are outside the scope of the bid protest process and should be referred to the Department of Justice since the interpretation and enforcement of such laws are functions of the Attorney General and the federal courts. MR Resources, B-242475, Feb. 14, 1991, 91-1 CPD ¶ 176.