



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: DynAmerica, Inc.

File: B-248237

Date: September 28, 1992

Thomas E. McCarthy for the protester.
Vera Meza, Esq., and Bridget Stengel, Esq., Department of the Army, for the agency.
Linda C. Glass, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee does not comply with the Buy American Act because it allegedly will be performing final assembly of the item in Mexico is denied where the record shows that the awardee is offering a domestic end product manufactured in the United States and is merely performing packaging in Mexico which makes the end product easier to use, rather than assembly or manufacturing operations.
2. Where protester files an agency-level protest which complains about agency's failure to correct allegedly erroneous evaluation of firm's prior performance for determining performance incentive contracting rating, an issue which RFP stated would be addressed during discussions, agency's subsequent receipt of best and final offers (BAFO) without holding discussions concerning rating constitutes initial adverse agency action, and protest to the General Accounting Office filed more than 10 working days after receipt of BAFOs is untimely.

DECISION

DynAmerica, Inc. protests award to Valentec Wells, Inc. under request for proposals (RFP) No. DAAA09-92-R-0063, issued by the United States Army Armament, Munitions and Chemical Command for a quantity of M13 ammunition links. DynAmerica contends that award to Valentec violated the Buy American Act because Valentec will perform final assembly of

the M13 ammunition links in Mexico.¹ DynAmerica also argues that its revised delivery schedules should have been used to evaluate it under the Performance Incentive Contracting (PIC) provisions of the solicitation.

We deny the protest in part and dismiss it in part.

The solicitation, issued on January 14, 1992, was for an amended quantity of 90,624,930 M13 ammunition links. The solicitation was restricted to the three industrial base producers, Valentec, DynAmerica and Greene International West, Inc. The solicitation provided that packaging of the M13 links would be in accordance with revision H of the packaging data sheet No. PS7268309, dated April 26, 1985, at level B/B. That data sheet stated that the unit packing quantity of 20 links must be packed in a paperboard box with the double loop inserted as indicated on the unit container and that a quantity of 375 paperboard box containers shall be placed in a container as specified.

The solicitation also contained PIC provisions which established a number of criteria concerning quality and on-time delivery that an offeror had to meet to qualify for an evaluation preference. Under the PIC provisions, if the responsible offeror submitting the lowest evaluated price were also PIC qualified, that is, has an overall 90 percent or greater on-time delivery rate in the federal stock class, then award would be made to that offeror. However, if the offeror submitting the lowest price is not PIC qualified, then that offer would be compared to the lowest PIC qualified offer to determine if the lower risk, higher priced PIC offeror represented the best value to the government. The solicitation provided that an offeror determined to be non-PIC qualified would be afforded an opportunity during discussions to review the information used in that determination and that an offeror's PIC status would be reevaluated if discussions indicate discrepancies in the qualification data.

Valentec and DynAmerica submitted the only offers received by the February 28 closing date for receipt of initial proposals. Valentec was determined to be PIC qualified.

¹The Buy American Act, 41 U.S.C. § 10a-d (1988), establishes a preference for the purchase of domestic products by the government. In implementation of the Act, the solicitation defined a domestic end product as one which is manufactured in the United States if the cost of its qualifying country components and its components which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7001 (1991 ed.).

DynAmerica was not PIC qualified because it was determined to have an on-time delivery rate of 78.9 percent. On March 26, best and final offers (BAFO) were requested, and DynAmerica was advised of its 78.9 percent on-time delivery rate. BAFOs were received on April 8.

By letter dated and received by the agency on April 6, DynAmerica protested the basis for how its on-time delivery rate was computed. The agency had computed the rate based on the original delivery schedules in DynAmerica's prior contracts. Those contracts had been modified, however, when DynAmerica found it could not meet the original schedules. According to the protester, this occurred because of the illness of its then president, a problem with the quench tank conveyor for its heat treatment system, and a fire in its tool room. DynAmerica stated that it would have made the effort necessary to meet the original schedules had it known the modified agreements would be disregarded for PIC purposes.

On May 13, the Army denied the protest and stated that the problems cited by DynAmerica were not excusable delays for purposes of the PIC evaluation. In the Army's view, the illness and quench tank conveyor problems were not beyond the control and without fault or negligence of DynAmerica and the fire had no impact on production.

Valentec's total evaluated price was \$5,151,583; DynAmerica's total evaluated price was low at \$5,111,445. Despite DynAmerica's low evaluated price, the agency determined that award to Valentec represented the "best value" to the government because of Valentec's 99.5 percent on-time delivery rate and 100 quality rating. Award was made to Valentec on May 13. DynAmerica filed this protest with our Office on May 28. Since this protest was filed more than 10 calendar days after award, performance of the contract was not suspended. See 31 U.S.C. § 3553(d) (1) (1988).

DynAmerica alleges that Valentec performs the final assembly process during which the M13 link is gauged checked, "orientated" and placed in the feeder sleeve in Mexico. DynAmerica maintains that the use by Valentec of Mexican labor to perform this final assembly precludes its manufacturing process from qualifying under the Buy American Act. The protester contends that the final form the government requires for its use of the M13 link is the link, properly orientated and placed 20 per sleeve in a feeder sleeve, so that the M13 link can be used in the government's automated cartridge insertion machine.

The agency reports that Valentec produces the links at its Costa Mesa, California facility, the quality assurance representative inspects the parts and then Valentec ships them for packaging. The agency states that manufacture of the M13 link ends when the fully formed and protectively coated metallic link is gaged and weighed and prepared for delivery to a packaging and packing operation. According to the Army, at this point in the process the link is fully formed and capable of end use, namely linking cartridges into the configuration specified in the cartridge technical data package. The agency further states that the placement of links into a cardboard carton is a packaging operation and is distinctly separate from the metal forming and treating operations.

Under the Buy American Act, the term "manufacture" means completion of an article in the form required for use by the government. Marbex, Inc., B-225799, May 4, 1987, 87-1 CPD ¶ 468. Manufacturing may include a mechanical operation performed on a foreign product or assembly of separate items, whereby the identity and character of the end item is established and fixed as to its current and future use. Thus, the key in determining whether a process constitutes manufacturing for Buy American Act purposes is whether the item being purchased by the government is made suitable for its intended use and its identity established. See Hamilton Watch Co., Inc., B-179939, June 6, 1974, 74-1 CPD ¶ 306; Imperial Eastman Corp.; Thorsen Tool Co., 53 Comp. Gen. 726 (1974), 74-1 CPD ¶ 153.

Here, based on our review of the record and of videotapes submitted by both DynAmerica and Valentec and the additional information from the agency, we find that the agency reasonably concluded that Valentec was merely performing a packaging process in Mexico and that the M13 links were actually produced in the United States.

The solicitation is for the manufacture of ammunition links which are metal parts into which a cartridge of a specified size is inserted. The ammunition links are connected together in a series to form ammunition belts. These belts are used in the automatic feeding of machine guns and cannons. It is the metallic link that is being procured here, and the record shows that the link is fully formed and capable of end use prior to its being placed in the cardboard carton known as a feeder sleeve. The Army states, and DynAmerica agrees, that the links could be bulk-shipped but instead are packed in an inner container (the sleeve) and then in an outer container (a larger fiberboard box) to prevent deterioration and damage during shipment.

In this regard, the solicitation packaging data sheet lists the packing requirements for the M13 link and requires that the links be packed 20 links per carton (feeder sleeve). The links have to be arranged in a certain manner so that 20 links will fit in the feeder sleeve. Three hundred and seventy-five feeder sleeves are then to be packed into a larger fiberboard box. This packaging is accomplished primarily by using feeder bowl tracks and chutes.

The protester argues that the feeder sleeve carton is a part of the end product because the placement of the links into the carton facilitates the Army's ability to use the links to form ammunition belts. We do not agree. The fact that a certain type of packaging makes the use of the end product easier does not make the packaging part of the end product. See 46 Comp. Gen. 784 (1967). The end products here are metallic ammunition links which are fully useable prior to being placed in the feeder sleeve. Thus, the process being performed by Valentec in Mexico is merely packaging and not manufacturing as alleged by the protester.

DynAmerica also argues that it was unfairly determined not to be PIC qualified based upon its delivery of M13 links pursuant to modifications of its current contract with the government. DynAmerica argues that it is unfair for the government to agree to modifications of a contract regarding delivery dates of M13 links and then to ignore the modifications in determining performance ratings. DynAmerica contends that the illness of its ex-president, a fire at its plant, and the unexpected problem with the quench heat-treatment systems used to heat cure M13 links were all problems beyond its control.


As previously stated, on April 6, DynAmerica protested its PIC evaluation to the Army; despite DynAmerica's protest, the agency proceeded with receipt of BAFOs on April 8. By letter dated May 13, the Army formally denied DynAmerica's agency-level protest; on May 28, DynAmerica filed the instant protest with our Office. We dismiss this protest issue as untimely.

Under our Bid Protest Regulations, if an agency-level protest has been filed initially, any subsequent protest to our Office must be filed within 10 working days after the protester has actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a)(3) (1992). Here, the solicitation PIC provisions provided for a reevaluation of the PIC determination during discussions. The agency in its letter dated March 26, which advised DynAmerica of its PIC status, also requested BAFOs by April 8. This request for BAFOs effectively advised offerors that discussions were completed. DynAmerica filed its agency-level protest on April 6. The Army proceeded with receipt of BAFOs

on April 8. Since the RFP PIC provision called for reevaluation of the PIC determination during discussions, we think DynAmerica was on notice when BAFOs were subsequently received that the agency did not intend to hold discussions with DynAmerica concerning its PIC rating. We think the agency's proceeding with receipt of BAFOs constituted initial adverse agency action on DynAmerica's agency-level protest and, thus, to be timely, DynAmerica should have filed its protest at the latest within 10 working days of the April 8 BAFO closing date. See Ramer Prods. Ltd.--Recon., B-224027.7, Sept. 28, 1987, 87-2 CPD ¶ 304. Accordingly, although DynAmerica's protest to this Office was received within 10 working days of the Army's formal May 13 agency-level denial, because this notice did not constitute the initial adverse agency action in this case, DynAmerica's protest to this Office is untimely.

Further, to the extent DynAmerica is now suggesting that the Army's implementation of the PIC is inconsistent with the Small Business Act, 15 U.S.C. § 637(b)(7)(A) (1988), because denial of award to DynAmerica was based on an adverse responsibility determination and there was no referral to the SBA, the matter is also untimely. The solicitation clearly stated the decision to use the PIC and to make award to the offeror representing the best value based on a PIC evaluation preference. If DynAmerica objected to that provision, it should have protested prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1); ROSCO Int'l Corp., B-242879, June 12, 1991, 91-1 CPD ¶ 564.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel