



Comptroller General  
of the United States

Washington, D.C. 20548

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Calhoun  
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## Decision

**Matter of:** Anderson Columbia Co., Inc.

**File:** B-250530

**Date:** November 24, 1992

Jeffrey A. Lovitky, Esq., for the protester.  
James C. McCutcheon, Esq., Garrett L. Rensing, Esq., and  
Paul M. Fisher, Esq., Department of the Navy, for the  
agency.  
Tania L. Calhoun, Esq., and Christine S. Melody, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

### DIGEST

1. Protest allegation that solicitation improperly failed to include provisions of Buy American Act is dismissed where the contract is to be performed outside the United States and therefore is not subject to the Act.
2. Protest allegation that solicitation improperly failed to include various labor provisions is dismissed where the contract is to be performed outside the United States and thus is not subject to domestic labor laws.
3. Protest allegation that solicitation improperly failed to include provisions of Balance of Payments program is dismissed where agency reports it will issue an amendment to include the program, rendering the allegation academic.
4. Protester is not entitled to reimbursement of the costs of filing and pursuing its protest where agency agreed to take corrective action in its agency report and where protester has not shown it expended time and resources it would not have expended had the agency taken corrective action earlier.

### DECISION

Anderson Columbia Co., Inc. protests alleged defects in invitation for bids (IFB) No. N62470-92-B-0941, issued by the Naval Facilities Engineering Command for station paving at various locations at the United States Naval Air Station (NAS), Guantanamo Bay, Cuba.

The solicitation was issued on August 7, 1992, with bid opening scheduled for September 30; 5 days prior to bid

opening, Anderson filed this protest, alleging that the solicitation was defective for a number of reasons: (1) it failed to include clauses requiring compliance with the Buy American Act; (2) it failed to include various labor provisions; and (3) it failed to include clauses requiring compliance with the Balance of Payment program.

We dismiss the protest and deny the protester's request for a declaration of entitlement to recovery of protest costs.

Anderson alleges that the solicitation improperly failed to include clauses implementing the Buy American Act, 41 U.S.C. §§ 10a-10c (1988). This protest ground is without a legal basis. The Buy American Act does not apply to work to be performed outside the United States. 41 U.S.C. § 10a; Federal Acquisition Regulation (FAR) § 25.202. Since the contract here is to be performed in Cuba, it is not subject to the provisions of the Buy American Act.<sup>1</sup>

Anderson contends that the solicitation failed to require compliance with various labor provisions, particularly those concerning wage rates. The protester expresses concern that the use of "low paid foreign labor . . . raises serious policy questions pertaining to the conduct of [United States] public works." Anderson has not stated a legally sufficient protest basis. Since this contract is to be performed in Cuba, United States labor laws do not apply; thus, those laws provide no legal basis for objecting to the Navy's failure to include them in this solicitation. Anderson Columbia Co., Inc., B-249475.3, Oct. 27, 1992, 92-2 CPD ¶ \_\_\_\_.

Anderson also asserts that foreign laborers at Guantanamo Bay may be forced to submit portions of their wages to labor brokers in violation of the Copeland Act; Anderson contends that the solicitation improperly failed to include any provisions implementing this Act. This protest ground also has no legal basis. The Copeland Act is inapplicable to this solicitation, as the contract is to be performed outside the United States and therefore is not subject to federal wage standards. See FAR § 22.407(a); 29 C.F.R. § 3.1 (1992).

Anderson finally contends that the solicitation improperly failed to include clauses implementing the Balance of

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<sup>1</sup>"United States" is defined for the purposes of FAR § 25.200 to mean "the United States, its possessions, Puerto Rico, and any other place subject to its jurisdiction, but does not include leased bases or trust territories." FAR § 25.101. The NAS at Guantanamo Bay, Cuba, is a leased base.

Payments Program (BOP). The agency reports that it has determined a BOP clause should have been included in the solicitation. To that end, the agency states that an amendment to the solicitation will be issued requiring offerors to use domestic materials except for those domestic materials which are determined to exceed the price of foreign materials by more than 50 percent (FAR § 25.302(c)), and those materials which are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality which are contained in the exempted products list (FAR § 25.108). The agency's issuance of such an amendment essentially grants the relief requested as to this ground of protest, rendering it academic. See Steel Circle Bldg. Co., B-233055; B-233056, Feb. 10, 1989, 89-1 CPD ¶ 139. Since it is not our practice to consider academic questions, this ground of protest is dismissed. See East West Research, Inc.--Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379.

In light of the agency's corrective action with respect to the BOP clause, Anderson requests that our Office declare it entitled to recover the costs of filing and pursuing its protest, pursuant to 4 C.F.R. § 21.6(e) (1992). Under that section of our Bid Protest Regulations, we may declare a protester entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees, where the agency takes corrective action in response to its protest. We will find such an entitlement only where, based on the circumstances of the case, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Tucson Mobilephone, Inc.--Request for Declaration of Entitlement to Costs, B-248155.2, July 22, 1992, 92-2 CPD ¶ 43.

Here, the protest was filed on September 25, and the agency notified our Office of its intention to take corrective action 25 working days later, in its November 2 agency report. Such action, taken early in the protest process, is precisely the kind of prompt reaction to a protest that our regulation is designed to encourage. It provides no basis for a determination that the payment of protest costs is warranted. Further, we find that the purpose of section 21.6(e)--to encourage agencies to take corrective action in response to meritorious protests before protesters have expended additional unnecessary time and resources pursuing their claims--was served here. See 56 Fed. Reg. 3759 (1991). In this regard, Anderson has not shown that the 5 weeks between its protest and the agency's corrective action caused it to expend time and resources that it would not have expended had the agency taken corrective action

earlier in the process. See Propulsion Controls Eng'g--  
Request for Declaration of Entitlement to Costs, B-244619.2,  
Mar. 25, 1992, 92-1 CPD ¶ 306. Accordingly, the protester's  
request for costs is denied.<sup>2</sup>

We dismiss the protest and deny the request for a  
declaration of entitlement to recovery of costs.

  
for James F. Hinchman  
General Counsel

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<sup>2</sup>Anderson argues that the corrective action was not prompt  
in light of the "glaring nature of the solicitation defi-  
ciencies" it protested. However, as discussed above, three  
of the four protest grounds raised by Anderson were clearly  
without merit.