



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Computer Hut International, Inc.

File: B-249421; B-249422; B-249423; B-249424;
B-249425

Date: November 23, 1992

Jim Spinner, Esq., Service, Gasser & Kerl, for the protester.
Ronald E. Cone and James Tower, Department of Energy, for the agency.
Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the evaluation of offers under the Buy American Act is sustained where the agency's prime contractor, acting by or for the government, made Buy American Act determinations regarding the domestic or foreign status of suppliers' offers for computer equipment without considering the issue of the place of manufacture for either the end products or the components being offered.

DECISION

Computer Hut International, Inc. protests the award of a purchase order for seven computer systems to ComputerLand under a request for telephone quotations dated March 26, 1992, referencing requisition No. 812751, that was issued by EG&G Idaho, Inc., as a management and operating contractor for the Department of Energy.¹ Computer Hut contends that it submitted the lowest price quotation, but that the agency improperly applied a price differential to the firm's offer, based on provisions of the Buy American Act., 41 U.S.C. § 10a et seq. (1988) ("the Act"), resulting in an improper

¹Although our bid protest jurisdiction is generally limited to protests concerning solicitations issued by federal contracting agencies, see Competition in Contracting Act of 1984, 31 U.S.C. § 3551 (1988), we review subcontract awards by Department of Energy management and operating contractors which procure goods and services "by and for" the government. 4 C.F.R. § 21.3(f)(10) (1992); 48 C.F.R. § 970.7107; Computer Manufactured Components, Inc., B-234781, July 11, 1989, 89-2 CPD ¶ 30.

award decision.² The protester also challenged awards that EG&G made under requisitions No. C92-316346, C-92-31640, C92-31641 and C92-G17434 on the basis that the firms receiving those awards had not offered systems with the requisite Federal Communications Commission (FCC) "Class B" certification.³

We sustain the protest concerning requisition No. 812751. We dismiss the protests of the other requisitions.

The request for telephone quotations was issued on March 26, 1992, to six potential suppliers. Computer Hut was among the five firms that submitted quotations by the March 31 deadline. On June 15, certain changes were made to the technical specifications by addendum; three firms responded, with Computer Hut submitting two separate quotes. These quotes were all found technically acceptable.

On June 24, EG&G provided representations and certifications to be completed by the firms, including a "Buy American Certificate." This paragraph stated, "The offeror certifies that each end product, except those listed below, is a domestic end product (as defined in the clause entitled 'Buy American Act'), and that components of unknown origin are considered to have been mined, produced or manufactured outside the United States." Spaces were provided for inserting the quoting firm's "Excluded end products" and "Country of origin." On the cover sheet, EG&G also requested that the quoting firms indicate the percentages of foreign and domestic content in the products being offered. On June 26, EG&G requested more specific information regarding the foreign and domestic content of the individual components, requiring the firms to list the cost of the hard

²The applicability of the Buy American Act ("the Act") has not been challenged. As a management and operating contractor for the Department of Energy, EG&G acknowledges that it is required to comply with the Buy American Act to the extent it has agreed to this obligation in its prime contract with DOE. That contract requires EG&G to comply with the policies set forth in Department of Energy Acquisition Regulation, 48 C.F.R. § 970.71 (1991), which specifically require compliance with the provisions of the Act.

³Although Computer Hut had also initially challenged whether the system ComputerLand was offering under requisition No. 812751 had the proper FCC "Class B" certification, EG&G provided a copy of the requisite certificate in its report. Without further comment from the protester, we deem this issue abandoned.

disk, floppy disk, monitor, motherboard, and other components they would supply, and to indicate whether each of these was foreign or domestic.

EG&G analyzed the firms' responses to determine which offered products would qualify as domestic end products, based on the provisions of the Buy American Act. Computer Hut had submitted two quotes, one based on supplying a domestic end product, and the other foreign. Computer Hut's quote based on a foreign end product was low. All of the remaining quotes were considered domestic. Pursuant to the Buy American Act and its implementing regulations, an evaluation differential is to be applied to the price of quotes for foreign end products when those quotes are competing with quotes of domestic end products; if the low domestic quote is from a small business concern, the contracting official is required to adjust each foreign quote by adding a factor of 12 percent. Federal Acquisition Regulation (FAR) § 25.105. The low domestic quote was from ComputerLand, a small business; thus, Computer Hut's foreign quote, which had been low, was increased by 12 percent and became second low (after ComputerLand). EG&G determined that ComputerLand had submitted the low evaluated, acceptable quote and was a responsible firm, and awarded the contract to this firm on June 30. On July 15, Computer Hut filed this protest.

Initially, Computer Hut protests that it should have received award on the basis of its low priced, foreign end product quote because the solicitation did not contain any notice that provisions of the Buy American Act would apply. It contends that a requirement that the offered computers contain a certain percentage of domestic components was imposed after quotes were received, allowing no opportunity to revise quotes. EG&G points out that Computer Hut had previously responded to several EG&G solicitations and had been provided a copy of EG&G's Standard Terms and Conditions, which incorporated by reference various articles and clauses into any purchase order or subcontract that EG&G awarded. The listed clauses include Buy American Act provisions implemented by the FAR and Department of Energy Acquisition Regulation. The protester does not deny receipt of these standard terms and conditions. In addition, the certifications that EG&G requested offerors to complete, including the "Buy American Certificate," certainly provided notice that EG&G intended to apply the Act; to the extent the protester is arguing that it should then have been given a chance to change its quote, it was required to file any

protest of this matter within 10 days after it knew, or should have known, of the protest basis; that is, within 10 days of July 9, when it received its copy of the required Buy American Certifications.

Computer Hut also protests that ComputerLand's quote was improperly evaluated as domestic, alleging that the awardee's quote would have to be considered foreign if the Buy American Act provisions were applied appropriately. If ComputerLand's quote were considered foreign, and its price were increased by 12 percent, Computer Hut's own domestic quote would have been low.

Specifically at issue is EG&G's analysis of the information firms provided concerning the components included in their computer systems. In its request for more specific information about the components of the offered systems, which EG&G ultimately relied on in its evaluation of quotes, EG&G provided a list of the five components required in the system and asked the firms to identify each one as "foreign" or "domestic" by inserting a checkmark in the appropriate space and to list the cost of each component. In its response, ComputerLand did not simply insert a checkmark and insert the price as instructed, but instead, inserted a partial price in the "foreign" and "domestic" columns, reflecting that portion of each component's price that was foreign or domestic in source. EG&G analyzed ComputerLand's response by characterizing each component as foreign or domestic according to which category listed more than 50 percent of the component's cost. Once a component was considered foreign on this basis, then the total value of the component was considered foreign for purposes of calculating the overall percentage of foreign content in the product being furnished.

As implemented in the FAR, the Act defines "domestic end product" as an "end product manufactured in the United States if the cost of its . . . components which are mined, produced or manufactured in the United States exceeds 50 percent (50%) of the cost of all its components." FAR § 25.101. Components are defined as "those articles, materials and supplies incorporated directly into the end products." *Id.* Thus, to qualify as domestic, an end product must meet a two-pronged test: (1) it must be manufactured in the United States; and (2) the cost of its components which are mined, produced or manufactured in the United States must exceed 50 percent of the cost of all its components. Components must also be manufactured in the United States to qualify as domestic components. See Rolm Corp., B-200995, Aug. 7, 1981, 81-2 CPD ¶ 106.

Here, EG&G's request for additional information simply stated, "EG&G Idaho, Inc, finds it necessary to obtain a further break down on the percentage of foreign versus domestic components. Please insert the cost of the following [list of components] and check if foreign or domestic." In order to determine whether a domestic source end product was being offered, EG&G needed information concerning the cost and place of manufacture of the components. As discussed above, rather than checking whether each component was of foreign or domestic manufacture, ComputerLand wrote the of amounts of each component's price that were foreign and domestic. This information was not relevant to the determination of whether the cost of components manufactured in the United States exceed 50 percent of the cost of all components.

The fact that ComputerLand had not listed any "excluded end products" in its Buy American certificate is not dispositive. While domestic certifications may be accepted at face value, an agency may not rely on them when it has reason to question whether a domestic product will in fact be furnished. See Autospin, Inc., B-233778, Feb. 23, 1989, 89-1 CPD ¶ 197. In this case, the contracting personnel did not rely on the certification alone, but affirmatively determined after they had received the certifications that it was necessary to obtain additional information.⁴ In fact, EG&G admits that its initial request for information was ambiguous and that it sought the additional information to "properly apply the [Buy American] evaluation criteria."

EG&G here realized that it could not simply rely on the certifications in the offers, but it failed to obtain sufficient information upon which to make a proper determination under the Buy American Act. Moreover, during the course of this protest, neither the Department of Energy, EG&G nor ComputerLand itself provided information establishing that ComputerLand's quoted product is in fact domestic. We therefore sustain this portion of the protest.

⁴In addition to the written inquiry concerning the origin of the various components, EG&G phoned ComputerLand to ask about the monitor it was offering, since it was the same monitor that all of the other firms were offering, but ComputerLand had designated it as "domestic" while all of the others had listed it as "foreign." ComputerLand stated that it did not really know whether it was foreign or domestic, and EG&G properly determined that it must be treated as foreign in the evaluation. After this inquiry, EG&G had reason to question the information ComputerLand had furnished in its certification as to origin of the other components.

Ordinarily, we would recommend that EG&G obtain the information necessary to determine the place of manufacture for the end products and components being offered by each of the firms, and to make an informed determination concerning the foreign or domestic status of the quotes. That recommendation is impracticable in this case because the awarded contract has been fully performed. By separate letter, we are advising the Department of Energy of our decision, and recommending that it advise its prime contractors to avoid any repetition of the deficiencies noted here.

Under the circumstances, we find that the protester is entitled to recover its costs of preparing its quote and the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d) (1992); Data Preparation, Inc., B-233569, Mar. 24, 1989, 89-1 CPD ¶ 300. Computer Hut should submit its claim for such costs directly to the agency.

Regarding Computer Hut's allegation that EG&G had awarded contracts to firms that had offered systems without the FCC Class B certification required under requisitions No. C92-316346, C92-316340, C92-316341, and C92-G17434, EG&G provided copies of the required certificates in its protest report. Computer Hut does not further pursue this issue. In its comments on the report, Computer Hut contends that it had also challenged whether the awards under these solicitations complied with the Buy American Act, and contends that the protests should be sustained "since EG&G has not denied the noncompliance." However, we find that Computer Hut's sole challenge to these solicitations in its initial protest submission was as follows: "the basis for Computer Hut's protest of the award of those requisitions, which were lower bids than that submitted by Computer Hut on the respective requisitions, is that such machines did not meet the required specifications which included that the systems be FCC Class B certified." The Buy American Act allegations concerning these requisitions, which were not raised until Computer Hut filed its comments in our Office on August 31, were raised well after the 10-day period allowed by our regulations for a post-award protest had passed, and thus are dismissed as untimely.

for Milton P. Jordan
Comptroller General
of the United States