

GAO

United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

R-225063.2

February 6, 1987

The Honorable Rudy Boschwitz
United States Senator
210 Bremer Building
419 N. Robert Street
St. Paul, Minnesota 55101

Dear Senator Boschwitz:

This responds to your December 1986 letter on behalf of Despatch Industries, Inc. (your file number 6346030014), concerning the firm's complaint that the Marine Corps improperly awarded a contract for rack ovens to Chefs Equipment and Repair Co.

Despatch alleges that more than 50 percent of the equipment to be supplied by Chefs Equipment will come from a Swedish firm. Consequently, Despatch argues, in accordance with the Buy American Act an evaluation factor should have been assessed against Chefs Equipment's bid of \$112,114, that is, the bid should have been evaluated as more than the price submitted, by a percentage specified in the statute's implementing regulations. In this respect, an offer is subject to a Buy American Act differential if the cost of its domestic components is less than half the cost of all its components. Despatch argues that with application of such a factor Despatch would be the low evaluated bidder, at \$115,410, and thus entitled to the contract award.

As Despatch notes in its November 21 letter to you, the firm did file a bid protest on the matter with our Office, which we dismissed in a November 5 decision. Our decision was based primarily on Despatch's protest submission, in which the firm stated the contract had been awarded to Gemini Bakery Equipment Co. (As discussed below, however, subsequent investigation shows that Gemini actually is the firm that will be supplying ovens to Chefs Equipment for delivery under the contract.) The reason we dismissed Despatch's protest was that we understood from the Marine Corps that Gemini had completed the Buy American Act certification in the invitation for bids to the effect that it would supply domestic

products, and the government's acceptance of the offer therefore obligated the firm to do so. Whether the contractor in fact complies with this obligation is a matter of contract administration, which our Office does not review.

To respond to your letter, and to resolve the inconsistency in Despatch's protest and November 21 letter regarding the actual awardee, we contacted the Marine Corps for further information. The Marine Corps now advises that Chefs Equipment is the firm that bid and was awarded the contract, and that the firm did not complete the Buy American Act certification. We point out that this last matter does not affect the conclusion in our bid protest decision, since the legal effect of not completing the certification is the same as certifying that domestic products will be supplied.

It is apparent from Despatch's November 21 letter that the firm is unclear as to the basis for our dismissal. What the decision means, essentially, is that Despatch's protest did not show that the award was illegal or otherwise improper. For purposes of evaluating bids, the government is entitled to rely on a bidder's self-certification that it is offering products that qualify as domestic and, so long as the bidder is judged capable of supplying such products, the government properly may accept the bid. That acceptance then legally obligates the bidder (now contractor) to furnish qualifying items. Oversight of contract performance, including insuring that the contractor meets its obligation in that respect, as well as in all other matters, is the function of the contracting agency, not our Office, as part of its responsibility to administer the contract.

Further, we do not think that the material Despatch has furnished to support its allegation establishes that Chefs Equipment will not supply items that qualify as domestic for Buy American Act purposes.

The documents enclosed with your letter to our Office show that Despatch evidently raised its concern with the Marine Corps before filing the bid protest, and the Marine Corps in turn secured a letter from Gemini, Chefs Equipment's supplier, listing six domestic-made component groups that, according to Gemini, represented 65 percent of the purchase price of the equipment. Based on Gemini's letter, the Marine Corps advised Despatch that it was satisfied that Chefs Equipment's bid should not be subject to the application of a Buy American Act differential. Also, in a November 25 letter to our Office, Gemini, commenting on Despatch's (by then dismissed) protest, stated that it imports, distributes, and manufactures baking and food service equipment; that it has

"a complete machine shop and sheet metal facility capable of producing a large variety of components and equipment"; and that seven listed component groups would be produced in the United States.

Despatch bases its allegation on three points. First, Despatch notes that a Dun & Bradstreet report states that only 10 percent of Gemini's business involves manufacturing bakery equipment and machinery, and that 90 percent of the machinery the firm sells is imported. On its face, however, the Dun & Bradstreet report is not necessarily inconsistent with Gemini's correspondence or with Chefs Equipment's express promise and obligation under this particular Marine Corps contract. The two remaining bases for Despatch's complaint are that "informal sources at Gemini" have advised Despatch that the ovens Gemini intends to furnish to Chefs Equipment are built in Europe, and that based on Despatch's own experience, the cost of the items listed in Gemini's letter to the Marine Corps would not account for 65 percent of the purchase price of the ovens. While we recognize the self-serving nature of Gemini's letters to the Marine Corps and our Office, we simply do not think advice from unnamed "informal sources" or Despatch's speculation serves to refute Gemini's assertion or compromise the Marine Corps' conclusion. In any case, as stated above, it is up to the Marine Corps to insure that Chefs Equipment fulfills its obligations in performing the contract.

Enclosed is a copy of Gemini's November 25 letter to our Office, as well as the memo and enclosures you sent us, as requested.

Sincerely yours,

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel

Enclosures