DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

61553

FILE: B-185842 DATE: September 27, 1976

MATTER OF: Cincinnati Electronics Corporation; Bristol Electronics, Inc.; E-Systems, Inc.

97970

DIGEST:

1. Contention that Army is required to fund third program year of multi-year contract before procuring similar supplies under RFP is without merit, because there is no showing that award under RFP would eliminate any requirements covered by third program year.

2. Grant of extraordinary contractual relief under Public Law 85-804--which has effect of making exercise of contract option viable possibility and leads agency to compare contract option price with prices of proposals received under RFP--does not constitute improper use of Public Law 85-804 authority to negotiate contract. Proscription in act is that extraordinary authority cannot be used to negotiate contracts for supplies or services which are required to be procured by formal advertising--which is not what occurred in this case.

3. No basis is seen to object to contracting officer's finding that radio sets available under existing contract option will fulfill existing need of Government. While comparison of option prices (including effect of possible price escalation) and prices of proposals submitted under RFP may be difficult, this does not establish that consideration of option as means of satisfying Government's requirements is precluded.

4. Impossibility of drafting adequate specifications is criterion for authorizing negotiation under 10 U.S.C. § 2304(a)(10) (1970), ASPR § 3-210.2(xiii) (1975 ed.). Where record does not show reasonable grounds to support conclusion of "impossibility," neither difficulty of drafting adequate specification for radio sets nor desire for negotiations in order to enhance or assure offerors' understanding of requirements justifies negotiation in lieu of advertised procurement. GAO recommends that if Army cannot find other basis to authorize current ongoing negotiated procurement, RFP should be canceled.

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5. Fact that contractor's prices under prior contract are public information does not establish that issuing new solicitation for similar items subjects contractor, as offeror under new procurement, to auction.

6. In regard to contention that Army is not following foreign military sale (FMS) requirements, recent GAO decision declined jurisdiction over similar transaction and in any event Army points out that item is not commercially available for FMS purposes if government-to-government agreement is in effect.

7. Contentions raised by prior contractor for radio sets--which did not submit proposal under RFP--will be considered despite allegations that contractor is not sufficiently interested to protest, because they are interrelated with Buy American Act issues raised in separate protest. Prior contractor's protest was premature at time of filing (issuance of RFP) but contentions are appropriately for consideration at present time.

8. Allegation that Mexican-assembled modules and other materials are directly incorporated into competitor's radio set, and that these foreign components make end product foreign under Buy American Act, is not supported by GAO decisions relied on by protester. While domestic-made parts are purchased in United States, shipped to Mexico for some manufacturing and returned to United States for additional manufacturing, there is no showing that separate "stages" of manufacturing are involved. GAO view is that domestic parts purchased in United States are components of end product.

9. 1975 GAO audit report expressed reservations whether contractor's 85 to 90 percent manufacturing of radio sets in Mexico satisfies Buy American Act requirement that materials must be "manufactured in the United States" in order to qualify as domestic end product, and recommended ASPR Committee consideration of issue. Recent protest decision in different factual context repeated recommendation. Considering Mexican manufacturing issue in present protest is therefore viewed as inappropriate.

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This is our decision on protests filed by Cincinnati Electronics Corporation (CEC), Bristol Electronics, Inc. (Bristol) and E-Systems, Inc., in connection with request for proposals (RFP) No. DAAB07-76-R-0181, which was issued on December 9, 1975, by the United States Army Electronics Command (ECOM). The RFP contemplates the award of a contract for 3,201 AN/PRC-77 radio sets, 1,193 RT-841 receiver-transmitters, and ancillary items.

The major issues raised in the protests are (1) what are the Army's rights and obligations with respect to satisfying its needs under CEC's current contract No. DAAB05-73-C-0006 (hereinafter contract -0006) as opposed to making an award under the RFP; (2) whether the Army should have formally advertised the present procurement rather than negotiating it; and (3) the manner in which the Buy American Act, 41 U.S.C. § 10a-d (1970), applies to the procurement.

Satisfying Needs under Current Contract v. Award under RFP

CEC protests that the RFP should be canceled because the Army must first satisfy its contractual obligations by funding the third program year under CEC's contract -0006. E-Systems protests that the Army must satisfy its requirements by an award under the RFP and cannot exercise any options under contract -0006. The Army disagrees with both protesters. (The Bristol protest relates to the Buy American Act and is discussed beginning on page 17.)

Contract -0006, awarded in 1973, is a multi-year contract which calls for the furnishing of a quantity of AN/PRC-77's and RT-841's in three program years with an option quantity provision for each year. The record indicates that the first program year has been or is being completed, with some portion of the option having been exercised. By contract modification dated March 22, 1976, the second program year was funded but the option for that year was not exercised. So far as the record shows, there has been no funding of the third program year.

In performing the contract, CEC reportedly experienced production and financial difficulties. The contractor applied for and received extraordinary contractual relief under Public Law 85-804, August 28, 1958, 50 U.S.C. § 1431, et seq. (1970) and ASPR section XVII (1975 ed.). The Army Contract Adjustment Board (ACAB) decision

No. 1185, December 31, 1975, authorized an increase in total contract price by an amount not to exceed $2,119,000. Also, ACAB clarification letter No. 1185a, April 20, 1976, authorized the contracting officer to increase the price of the option quantities to a maximum of $557 per unit before escalation.

The contracting officer has stated that ACAB's action gave him the tools to reasonably consider exercise of the CEC contract option which had not theretofore been considered viable. By message dated April 14, 1976, he advised the offerors that the CEC option would be considered after negotiations under the RFP. This prompted the protest by E-Systems.

CEC argues essentially that if the Army has funds available, it is required to fund all 3 program years under CEC's multi-year contract -0006 prior to any procurement of comparable supplies by other means, such as by issuing the present RFP. This is based on precedent that the multi-year contract does not afford the Government an election to buy or not to buy any year's requirement on the basis of the market. See, generally, Condec Corporation, ASBCA No. 14234, 73-1 BCA 9808, and decisions discussed therein. CEC argues that by issuing the RFP, the Army has indicated its intent to ignore its obligations under contract -0006, and that an award under the RFP may effectively terminate for convenience the unfunded third program year of the contract. CEC contends that the termination for convenience costs must be included in the RFP as an evaluation factor to be applied against other offerors' prices.

E-Systems contends first that extraordinary relief under Public Law 85-804 cannot be used for the negotiation of purchases or contracts for property. E-Systems does not argue that CEC was prohibited from receiving the relief, but points out that ECOM's considering the exercise of option provisions under contract -0006 could not or would not be possible but for the ACAB's action. If ECOM could not exercise the CEC option, purchase by other means--such as under the current RFP--would be necessary. Thus, in E-Systems' view, exercising the option would be using Public Law 85-804 for negotiation purposes, which is prohibited. See 50 U.S.C. § 1432(c) (1970).

E-Systems' second contention is that exercise of the contract -0006 option is prohibited under ASPR § 1-1505 (1975 ed.) because (1) the

radio sets to be furnished under CEC's option are substantially different from those called for under the RFP, and therefore do not fulfill an existing need of the Government as required by ASPR § 1-1505(c)(ii), and (2) comparison of the option prices with the prices under the RFP is impossible because it could not include adjustment of the option prices to account for necessary technical changes; the actual cost of unpriced change orders; the effect of price escalation (up to 15 percent) under the second and third year of CEC's contract; the price of items which are Government-furnished under CEC's contract but contractor-furnished under the RFP; and the increased costs attributable to CEC compliance with the RFP production evaluation clause (if incorporated into contract -0006).

The Army's position, briefly stated, is that the requirements being sought under the RFP are in addition to those which would be obtained under the basic program year quantities of contract -0006. The agency states that at the time the RFP was issued (December 9, 1975), there was doubt that CEC's option was a viable alternative because Public Law 85-804 relief had not yet been granted by ACAB. It is reported that the RFP was issued for a portion of the accumulating requirements instead of exercising an option to the first program year under contract -0006. The agency believes that these facts effectively moot CEC's contentions.

Further, the Army denies E-Systems' assertion that Public Law 85-804 is being used for negotiation authority, citing in this regard ACAB No. 1040, April 27, 1962, where the Board held that correction of a bid mistake which increased the contract price over the $2,500 small purchase negotiating authority limit did not constitute use of the act as negotiating authority. The agency further contends that despite changes in the contract -0006 radio set drawings which have occurred since 1973, the function and capacity of the radios furnished under the contract are the same as the radios called for in the RFP, and that CEC's contract -0006 option can therefore fulfill an existing need of the Government. The contracting officer also believes that he is required to consider the option prices vis-a-vis the prices offered under the RFP, and that while a comparison of the two may be difficult it is not impossible.

CEC's protest, in our opinion, is without merit. In light of the Army's statements, there is no showing that an award under the RFP would eliminate or supplant any of the program year requirements (as opposed to option quantity requirements) under contract -0006.

In other words, there is no reason to believe that the Army will not at some point in the future fund the third program year of contract -0006. We do not find that the general principles discussed in Condec Corporation, supra, and other ASBCA decisions relied on by CEC support the result which CEC requests in its protest--i.e., that the RFP must be canceled.

We likewise believe that E-Systems' argument concerning the improper use of Public Law 85-804 as negotiation authority is without merit. 50 U.S.C. § 1432(c) provides that nothing in Public Law 85-804 as amended shall be construed to constitute authorization for the negotiation of purchases of or contracts for property or services required by law to be procured by formal advertising or competitive bidding. The Army is not relying on Public Law 85-804 in the present case to negotiate a contract with CEC which otherwise would be required to be advertised. Rather, relief granted under Public Law 85-804 has had the effect of making viable the possible exercise of a contract option--a preexisting right which the Government obtained when contract -0006 was awarded--in lieu of an award under the RFP. We do not see how this violates 50 U.S.C. § 1432(c).

ASPR § 1-1505 provides that options should be exercised only if it is determined that certain circumstances are present; for instance, that the requirement covered by the option fulfills an existing need of the Government and that the exercise is the most advantageous method of fulfilling the Government's needs, price and other factors considered. Also, if the contract or its option provides for price escalation and the contractor requests a revision of price pursuant to this provision, the effect of escalation on prices must be ascertained before the option is exercised.

We believe the basic issue regarding the option is whether anything presented by E-Systems demonstrates that the contracting officer is precluded from considering the CEC option along with the offers submitted under the RFP. First, we see no basis to question the contracting officer's finding that CEC's radio sets--despite the technical differences between them and the radio sets being procured under the RFP--will fulfill an existing need of the Government. The record indicates in this regard that relatively few of the technical changes are regarded as significant by ECOM. Further, we do not agree with E-Systems' suggestion that the terms and conditions

of CEC's performance under the option must actually be modified so that they are identical with the terms and conditions of performance of a contract awarded under the RFP. Rather, as the contracting officer indicates, a comparison is possible if both the option and a contract awarded under the RFP are considered to be methods of obtaining equipment which will fulfill the Government's needs--though there may be some differences in the equipment and the terms and conditions under which it is furnished.

As for the effect of price escalation and the problem of comparing the option prices with the proposal prices, the contracting officer has stated:

> "It is the intention of the Contracting Officer to to determine what an appropriate adjustment would be, if at all necessary, at the time the price comparison would occur and use same as an evaluation factor to be added to the -0006 option price of $545. This would be one of the adjustments necessary for a fair comparison of the respective prices. * * *"

ASPR § 1-1505 requires, in our opinion, that a reasonable and good faith effort be made to determine whether exercise of the option is most advantageous, price and other factors considered--not that the effect of price escalation or other adjustments must be determined with absolute certainty before any exercise of the option can be contemplated. The fact that it may be difficult to make such determinations does not preclude consideration of the option as a means of satisfying the Government's requirements. We see no basis to object to the contracting officer's position in this matter.

Advertising v. Negotiation

CEC also contends that the procurement should have been formally advertised rather than negotiated. ECOM's determination that it was impracticable to obtain competition by formal advertising (10 U.S.C. § 2304(a)(10) (1970)), ASPR § 3-210.2(xiii) (1975 ed.) was based on these findings:

> "1. Under RFP DAAB07-76-R-0181, the USAECOM proposes to procure by negotiation 4394 Radio Sets AN/PRC-77 and subassemblies thereof, along with associate test equipment and data. The estimated cost is approximately * * *. The procurement will include a 100% option.

"2. Due to the lengthy period of performance (32 months, plus 5 months with exercise of the option provision), the difficulty in foreseeing the rate of inflation, and the necessity to eliminate contingency allowances, it has been determined to use a Fixed Price contract with economic price adjustment. The clause is set forth in ASPR 7-107. This clause is not permitted in formally advertised procurements.

"3. Due to the revision of drawings pertinent to the radio design, several modular changes, and the numerous Engineering Change Proposals (ECPs) (approved, pending approval, and expected), procurement by negotiation is necessary. Prior to the award of the contract, and due to the inclusion of Pre-Production Evaluation in the solicitation, it is necessary to have the opportunity for discussions and specification changes subsequent to receipt of proposals."

Additionally, the Army has stated that the contractors performing under the two existing contracts awarded pursuant to formal advertising in 1973 (CEC and Sentinel Electronics, Inc.) have experienced great difficulty in performing under the specifications, leading to what are described as tragic results. It is reported that the delivery schedule under the contracts has been extended four times; that deliveries did not commence until earlier this year, and that both contractors have sought extraordinary contractual relief under Public Law 85-804. The contracting officer has repeatedly stated that in his judgment, technical discussions were needed in the present procurement to obtain effective competition and to insure full understanding of the specifications by the offerors.

The Army also makes reference to the numerous changes in the specifications which have occurred (a total of at least 440 drawing changes and 65 engineering change proposals) under the two prior contracts.

In short, it is the Army's view that since the items being procured are very complex, negotiations are necessary to require offerors to give a detailed explanation of their technical approaches and to thereby insure that offerors attain a complete understanding

of the requirements. In these circumstances, the agency states that a broad interpretation was given to the following language in ASPR § 3-210.2(xiii), supra, which can authorize procurement by negotiation:

> "* * * when it is impossible to draft * * * adequate specifications or any other adequately detailed description of the required supplies or services * * *."

The Army also cites Design Concepts, Inc., B-184754, December 24, 1975, 75-2 CPD 410; Electronic Communications, Inc., 55 Comp. Gen. 636 (1976), 76-1 CPD 15; B-164596, September 20, 1968, and other decisions of our Office in support of its position.

We note that the RFP as drafted emphasizes the need for offerors to show their understanding of the requirements. Some pertinent sections in this regard are B.43 (offerors bear the burden of showing the cost realism of their proposals); section C.21 (sufficient detail must be presented to show how the contract requirements will be met by implementation of the offeror's plans; each and every technical factor and subfactor in the RFP must be addressed in proposals; a milestone chart must be presented to show the major events which will occur over the duration of the contract); section D.2 (the technical approach must demonstrate an understanding of the requirements and the means to fulfill them; section D.3 (6 major technical factors to be addressed in proposals--Production Engineering; Manpower Application and Qualifications; Schedules and Control; Production; Quality Assurance Plan; and Data Items).

Included as a subfactor under Production Engineering is Production Evaluation, whereunder the offeror is required to describe the detailed procedures it will employ to satisfy the RFP's Production Evaluation provision. The provision states essentially that while the Government warrants the basic design represented by its engineering drawings as being inherently capable of meeting the equipment specification requirements, the contractor shall make a detailed review of all Government-furnished technical data, for the purpose of identifying any errors and proposing steps to correct them.

CEC's principal arguments may be summarized as follows: Past procurements for these supplies have been formally advertised. The

present RFP contains detailed design specifications, provides for waiver of first article testing, and does not call for contractor design initiative. There is no showing by the Army in this case that it was impossible to draft specifications adequate for formal advertising. Also, the Government's desire to utilize a particular clause, such as the economic price adjustment clause, cannot in itself justify negotiated procurement. Moreover, ASPR §§ 2-104 and 3-404.3 (1975 ed.) authorize use of economic price adjustment provisions, generally, in advertised procurement; Defense Procurement Circular (DPC) 74-5, issued October 3, 1975, authorizes such use of the particular clause in question here. Similarly, there is nothing in the preproduction evaluation clause which requires negotiations. The real reason for negotiated procurement is ECOM's desire to assure itself that the selected contractor will have the capability to perform satisfactorily. Such assurance should be obtained through a preaward survey, not negotiations. Mere "complexity" of an item being procured cannot justify negotiations. Also, the record shows that the technical changes in the specifications were not the justification for negotiated procurement, because a memorandum prepared by a cognizant ECOM technical person states:

> "This office is not prepared to defend the essentiality of the technical changes contained in the solicitation over either Cincinnati or E-Systems. The fact that the present solicitation contains changes above the current contracts was not the basis for recommending competitive negotiation in the procurement data clearance. That recommendation was based on a change in ECOM policy allowing competitive negotiation for procurement of complex equipments, such as the AN/PRC-77. The complexity of the AN/PRC-77 is supported by examination of the difficulties experienced throughout the procurement history."

The record further shows that only a few of the technical changes are regarded as "significant" by ECOM.

In support of its position, CEC cites 41 Comp. Gen. 484 (1962); also ALS Electronics Corporation, B-181731, October 18, 1974, 74-2 CPD 214, and Fechheimer Brothers, Inc., B-184751, June 24, 1976, 76-1 CPD 404, are cited for the proposition that a specification itself, not the agency's experience with it, is the criterion for deciding whether advertising is feasible and practicable.

10 U.S.C. § 2304(a) provides that purchases and contracts "shall be made by formal advertising in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances." If advertising is not feasible and practicable, a determination and findings (D&F) may be executed authorizing procurement by negotiation, providing that the circumstances described in one of 17 exceptions are applicable. The tenth exception is where the purchase or contract is for property or services for which it is impracticable to obtain competition. The findings of a D&F are final; however, our Office is not precluded from reviewing the determination based on those findings. 51 Comp. Gen. 658 (1972). In 41 Comp. Gen. 484, supra, at 492, we indicated that we would not object to a determination to negotiate on the basis that it is impracticable to obtain competition where any reasonable ground for the determination exists.

CEC's contention that the specification itself, not past experience with it, is the only relevant criterion is not persuasive. ALS Electronics Corporation and Fechheimer Brothers, Inc., supra, involved situations where the contracting agency had no prior experience with the specification. We have recognized that where the specifications in an advertised procurement perhaps cannot be stated with sufficient clarity to insure the same understanding by all bidders, it is appropriate for the agency to consider using a more flexible procurement method. B-175585, November 8, 1972.

However, the fact that a procurement is for "complex" supplies or services does not per se preclude the use of formal advertising. Sorbus, Inc., B-183942, July 12, 1976, 76-2 CPD 31; Bob Milner and Associates, B-181637, January 22, 1975, 75-1 CPD 41. Also, we have observed that the statute contemplates the impossibility of drafting adequate specifications, not merely the inconvenience or difficulty of doing so. 52 Comp. Gen. 458, 461 (1973); Cf. 46 id. 631, 640 (1967).

In the present case, CEC correctly points out that the specification is detailed and that the record does not show the impossibility of revising the specification to incorporate the technical changes which have occurred. It appears that the Army's position is not that

it is impossible to draft a detailed specification describing the agency's needs; rather, it is based upon the belief that it is impossible to draft a specification or description of the work adequate enough to assure that offerors obtain a satisfactory understanding of the requirements without negotiations.

However, we find that the principal decision relied upon by the Army--Design Concepts, supra--does not support its position. Design Concepts involved a factually dissimilar situation where the agency believed it could not draft specifications adequate for formal advertising because the nature of the design services being procured was such that a variety of individual "approaches" could be taken by offerors. We agreed that the agency could not describe its needs with sufficient specificity to permit formal advertising. The decision then recognized that factors traditionally associated with responsibility--such as understanding of the requirements, experience, and facilities--could be used in the technical evaluation of proposals. However, the decision clearly indicated that this was so only if the propriety of procurement by negotiation had been established in the first place.

The difficulty with the Army's position in this case is that the record does not demonstrate the impossibility of drafting a specification which will be adequate enough to describe in detail what the agency wants to buy and to make competition among bidders on the basis of that specification feasible and practicable in an advertised procurement. If it is possible to draft a description of the product or service adequate enough to permit such competition, the desire to conduct discussions with offerors to assure their understanding of the specification or to cover matters traditionally related to responsibility cannot, in our opinion, authorize a negotiated procurement under 10 U.S.C. § 2304(a)(10).

The Army has cited the past performance difficulties under CEC's and Sentinel's contracts. However, the record before us does not demonstrate that the contractors' inability to understand the specification was the sole or even the primary cause of the performance problems. ACAB No. 1185, supra, raises the inference that some of CEC's difficulties may have been due to its business judgment in bidding on the 1973 procurement in the expectation that it would receive both the non-set-aside and set-aside portions of the award.

As it developed, the total award was split between CEC and Sentinel. The ACAB decision further indicates that a sharp escalation in material costs may also have been a factor in CEC's performance difficulties.

In any event, even assuming that difficulties with the specification used in the 1973 ECOM IFB have been a factor in CEC's and Sentinel's performance problems, the record before us does not establish reasonable grounds for a conclusion that it was in fact impossible to revise the specification for the 1976 procurement so that bidders could obtain a reasonably accurate understanding of what is called for. Compare B-175585, supra, where the IFB initially issued was canceled, and our decision on protests under the second IFB concluded that the specifications perhaps could not be stated with sufficient clarity to insure the same understanding by all bidders. Also, B-164596, supra, concerned the third of three negotiated solicitations which included complex rate structures for container and warehousing services. The fact that the Government had to explain the specifications to offerors under the first and second RFP's, which in turn led to price reductions in the offers, was cited as experience justifying the determination to conduct the third procurement on a negotiated basis. Neither case involved a factual situation substantially similar to the one here.

In short, we believe the pertinent criterion is not the difficulty of drafting an adequate specification or the desirability of negotiations with offerors to enhance their understanding of the requirements, but the impossibility of drafting a reasonably adequate description of what is to be purchased. In a protest connected with the 1973 ECOM advertised procurement of AN/PRC-77 radio sets, we recognized that no data package or specification can be expected to be totally without defects. 52 Comp. Gen. 219, 222 (1972). While we are not unaware of the administrative difficulties which can result during contract performance because of problems with the specifications, we do not believe that the hope of minimizing these difficulties through negotiations authorizes procurement by negotiation unless it is impossible to draft a specification adequate for advertising. Cf. Nationwide Building Maintenance, Inc., 55 Comp. Gen. 693, 696 (1976), 76-1 CPD 71. To permit the use of negotiation under the circumstances of this case would be to suggest, in effect, that negotiation is authorized in any instance where a complex product is being procured and the agency desires to insure the offerors' understanding of an admittedly detailed specification. We think the correct approach is to attempt to revise

and improve the specification, and to rely on a preaward survey to establish the prospective contractor's capability to perform.

The Army also suggests that Electronics Communications, supra, supports the use of a production evaluation provision as a justification to procure by negotiation. That case did involve the question of an offeror's compliance with such a provision in a negotiated procurement, but does not stand for the proposition advanced by the agency. The Army further cites one of its internal procurement pamphlets which discusses the preproduction evaluation concept and indicates that offerors' understanding of the special responsibilities imposed by such provisions can best be obtained by negotiation. We see no basis to disagree with the view that negotiation is desirable, but this does not establish that advertising is impracticable. A prospective contractor's understanding of the requirement could also be ascertained in a preaward survey. We note also that a production evaluation provision was used in ECOM's 1973 formally advertised AN/PRC-77 procurement. See 52 Comp. Gen., supra, at 222.

As for the economic price adjustment clause, the contracting officer points out that DPC 75-4, authorizing use of the clause in an advertised procurement, was not received by ECOM until after the RFP had been issued, and that under ASPR § 1-106.2(d) (1975 ed.), there is no requirement to use new DPC clauses if doing so would delay a solicitation. Since we have found that procurement by negotiation in this case is otherwise unsupported, we do not believe that it could be justified based solely on the circumstances described by the contracting officer.

Since a negotiated procurement in this case is not, in our view, authorized under 10 U.S.C. § 2304(a)(10), there is the question of what action should be taken. By letter of today to the Secretary of the Army, we are recommending that the Army consider whether authority to support the current procurement can be found under one of the other exceptions in 10 U.S.C. § 2304(a), such as where the public exigency will not permit the delay incident to advertising (10 U.S.C. § 2304(a)(2)). If the Army believes other authority can be used, an appropriate D&F should be executed. While an after-the-fact authorization of this kind is somewhat irregular, our Office would have no objection to such action in light of the lengthy procurement and protest process in this case, and the Army's need for

the supplies. Also, we understand that the funds appropriated for the procurement are available only until September 30, 1976. However, if appropriate negotiation authority cannot be found, we see no alternative other than cancellation of the RFP.

Alleged Conduct of Auction by Army

CEC also contends that by issuing the present RFP, the Army has subjected CEC to what amounts to an auction, because CEC's prices under its prior contract are public information. The protester points out that auctions are improper, citing ASPR § 3-805.3(a) (1975 ed.), B-170142, October 27, 1970, and B-151976, October 15, 1963.

An auction situation usually arises when there has been an improper disclosure of offerors' identities and/or the contents of their proposals during an ongoing negotiated procurement. This was what occurred in the procurements involved in the two decisions of our Office cited by CEC. In the present case, we see no reason why the public availability of CEC's prices under a prior contract creates an auction situation with reference to the present ongoing procurement.

Foreign Military Sales

CEC has also raised several contentions concerning the Foreign Military Sales (FMS) aspect of this procurement. A small portion of the total quantity of AN/PRC-77's and RT-841's are being procured for FMS purposes. CEC argues, among other things, that ASPR § 6-705.2(a) (1975 ed.) (which proscribes sales of commercially available supplies to economically developed countries) and established DOD policies are being violated under the circumstances prevailing in this case.

The Army believes that our Office lacks jurisdiction in this matter because the funds for the FMS quantities are not appropriated funds, but rather are payable from the Army Military Sales Trust Fund pursuant to "dependable undertakings" with the countries involved.

In a recent decision involving similar circumstances (Tele-Dynamics, Division of AMBAC Industries, 55 Comp. Gen. 674 (1976), 76-1 CPD 60), we declined to render a decision on a protest as to the proper recipient of an award since payments from appropriated funds were not involved.

In any event, as the Army points out, we have previously held that even if a product is in fact commercially available, it may nevertheless be considered not commercially available for FMS purposes if the Department of Defense determines that a government-to-government agreement is compelled by the national interest. Hy-Gain Electronics Corporation, et al., B-180740, December 11, 1974, 74-2 CPD 324. The Army's August 23, 1976, report points out that the only units being procured for an economically developed nation are certain Government-furnished equipment for Norway, and that a government-to-government agreement has been executed covering this sale.

Buy American Act

The protest filed by Bristol alleges that the Army is not properly applying the Buy American Act to this procurement. Before reaching the merits of this complaint, two procedural issues must be addressed: (1) Is Bristol an "interested party" eligible to protest under our section 20.0(b) of our Bid Protest Procedures (4 C.F.R. § 20.0(b) (1976))? (2) Is Bristol's protest timely?

The Army and CEC have expressed doubts that Bristol is an interested party to protest in light of the fact that Bristol did not submit a proposal under the RFP. We do not find it necessary, however, to decide this issue. We note that E-Systems, whose status as a protester is unquestioned, has also raised issues regarding the application of the Buy American Act. As described infra, the thrust of E-Systems contentions is somewhat different from Bristol's, but both parties contentions are also interrelated. In these circumstances, we believe it is appropriate to consider Bristol's contentions as though Bristol were determined to be a party sufficiently "interested" to protest in this case.

The timeliness question arises because on January 16, 1976, Bristol requested of the contracting officer a formal determination as to the amount of manufacturing labor which had to be done in the United States in order to comply with the act. ECOM responded on January 29, 1976, that the question could not be answered in the abstract because compliance with the act must be determined on a case-by-case basis. Bristol's protest to our Office was filed on February 20, 1976, apparently more than 10 working days after it received the ECOM response.

We believe--as suggested by several statements in the Army's reports--that Bristol's February 20, 1976, protest was premature. Bristol's protest at that time complained that the solicitation did not contain a clear interpretation of the act's requirements and also that a current contractor (CEC) possessed an unfair advantage because of its foreign manufacturing operation. We agree with the Army that the question of proper compliance with the act by a contractor ordinarily arises at the time a bid or proposal appears to be in line for award. Even if the bid or proposal takes no exception to the certification that a domestic source end product will be furnished (paragraph 7, Standard Form 33 (Nov. 1969)), the contracting agency may nevertheless be required under the circumstances to reasonably satisfy itself that the offeror intends to comply with the certification. See Unicare Vehicle Wash, Inc., B-181852, December 3, 1974, 74-2 CPD 304.

No award has yet been made under the RFP. However, in view of the time which has elapsed since the filing of Bristol's protest and the possibility that CEC may receive an award, we see no valid reason to regard the Buy American Act issues as premature at this time.

The Buy American Act requires that only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials or supplies mined, produced or manufactured in the United States shall be acquired for public use unless the head of the agency concerned determines it to be inconsistent with the public interest or the cost to be

unreasonable. 41 U.S.C. § 10a. Executive Order 10582, December 17, 1954, provides that materials (including articles and supplies) shall be considered to be of foreign origin if the cost of the foreign products used in such materials constitutes 50 percent or more of the cost of all the products used in such materials. The applicable contract clause prescribed by ASPR § 6-104.5 (1975 ed.) further provides that "end products" are those articles, materials, and supplies which are to be acquired under a contract for public use; that "components" are those articles, materials or supplies which are directly incorporated in the end products; and that a "domestic source end product" is an end product manufactured in the United States if the cost of the components thereof which are mined, produced, or manufactured in the United States or Canada exceeds 50 percent of the cost of all its components.

We do not believe that an end product can be considered domestic when it is completely manufactured abroad from domestic components. Cf. 52 Comp. Gen. 13 (1972). In other words, we believe that the act imposes two requirements: that manufactured articles, materials or supplies must be manufactured both (1) in the United States, and (2) substantially all from "components" mined, produced or manufactured in the United States. Cf. Unicare Vehicle Wash, Inc., supra,

The issues raised in this case involve both of these requirements. Bristol argues primarily that CEC's end product will not be "manufactured in the United States" because 85 to 90 percent of the manufacturing is accomplished in Mexico. E-Systems, on the other hand, contends that more than 50 percent of the components of CEC's end product are foreign. Both protesters reach the same conclusion--that CEC's end product is foreign.

It is to be noted that procurement of foreign end products is not prohibited; however, a percentage factor or differential is added to offers of foreign end products in the evaluation of proposals. See ASPR § 6-104.4 (1975 ed.).

The factual background is as follows. CEC's manufacture of AN/PRC-77 radio sets under its contract -0006 was discussed in an audit report of our Office (B-175633, November 3, 1975, PSAD 76-41) wherein we stated:

"* * * Components are purchased by Cincinnati's Ohio plant, inspected there, and shipped to a wholly owned subsidiary (CE Sonora) in Hermosillo, Sonora, Mexico, for assembly. The Sonora plant ships back a nearly fully assembled radio for final assembly, testing, conditioning, and adjusting at the Ohio plant.

"The Defense Contract Administration Services District in Cincinnati, Ohio, inspects all components before they are shipped to the Sonora plant. The District administrative contracting officer stated that virtually all are of domestic origin.

* * * * *

"Documents in the Army Electronics Command's contract files indicated that Sonora assembles an essentially complete radio and that only 10 to 15 percent of the total assembly man-hours are performed at the Ohio Plant."

To this, CEC adds that the parts purchased and shipped to Mexico are transistors, diodes, metal housings, capacitors, and other hardware. When they are returned from Mexico, CEC states that it performs "several additional assembly operations, 'burn-in,' alignment, adjustment, testing and packaging." E-Systems, on the other hand, believes that the end product consists of the following components: (1) the front panel assembly, which includes the chassis, gear train, wiring harness, and miscellaneous parts; (2) 29 modules, 24 of the "plug-in" type and 5 which require soldering; and (3) the battery box and dust cover. E-Systems contends that CEC's end product is substantially manufactured in Mexico and shipped to the United States with all 29 modules in it, and that at least the front panel assembly and all of the modules are Mexican assembled and therefore foreign components.

E-Systems' contentions in this regard may be summarized as follows. A component is something directly used in the manufacture of the end product. 45 Comp. Gen. 658, 659 (1966); under the contract clause and ASPR it means those articles, materials and supplies which are directly incorporated into the end product. 50 Comp. Gen. 697, 701 (1971). GAO has recognized foreign-made subassemblies as being components. 39 Comp. Gen. 695 (1960). Moreover, mere assembly

of parts constitutes "manufacture" and foreign parts may be assembled into a domestic component. 46 Comp. Gen. 813 (1967); 47 Comp. Gen. 21 (1967); Hamilton Watch Company, B-179939, June 6, 1974, 74-1 CPD 306. If foreign parts lose their identity when assembled as domestic components, it follows that CEC's domestic parts lose their identity when assembled in Mexico. The above decisions and 49 Comp. Gen. 606 (1970) and 52 Comp. Gen. 13, supra, show that CEC's Mexican manufacturing operation makes foreign components. Thus, since the domestic components do not exceed 50 percent of the cost of all components, CEC's radio sets are not a domestic source end product. Under E-Systems' reasoning, it is unnecessary to decide the question whether CEC's end product is "manufactured in the United States" because the cost of its domestic components does not exceed 50 percent of the cost of all its components.

Our Office has not attempted to define "component"; rather, the meaning and application of the term are considered in light of the particular facts of each case. See 47 Comp. Gen. 21, supra, at 25. Also, the act does not use the term component but rather speaks of the manufacture of articles, materials or supplies from other manufactured articles, materials and supplies. It appears to us that CEC's manufacture begins with the parts shipped to Mexico and ends with the completion of the radio set. We have no difficulty in regarding the parts purchased by CEC as being directly used in the manufacture of and directly incorporated into the end product. Decisions such as 45 Comp. Gen. 658, supra (see, also, Davis Walker Corporation, B-184672, August 23, 1976), involved identifiable, separate manufacturing stages which were viewed as significant in determining the identity of the components and the scope of the manufacturing. In this regard, CEC asserts that its manufacturing involves one continuous "process." We see no basis on the record to find that the manufacture of the radio sets involves separate "stages." Compare Davis Walker Corporation, supra.

While E-Systems' argument proceeds logically based upon the ASPR definitions and the holdings of past GAO decisions, we must note that the definitions are only a conceptual guide, and that each decision involved its own particular factual situation. For instance, 39 Comp. Gen. 695, supra, indicates that "sub-assemblies" were a component of hydraulic turbines; in 46 Comp. Gen. 813, supra, electric motors were regarded as a component of circulating pump units; 50 Comp. Gen. 697, supra, held that a power unit was a component of a low-noise microwave

transistor amplifier with integral power supply; in Hamilton Watch Company, supra, assembled watch movements were regarded as components of watches; and in 52 Comp. Gen. 13, supra, softball cores were stated to be components of softballs. In general, we believe that none of these decisions involved a factual situation so similar to to present case as to be controlling. At the same time, we recognize that distinguishing these decisions is complicated by the fact that some of them do not discuss in detail the rationale for determining that certain materials were components. However, the facts involved in 46 Comp. Gen. 813, 50 id. 697 and 52 id. 13, supra, do raise the inference that--unlike the present case--separate manufacturing stages may have been involved in producing the electric motors, the power units and the softball cores, respectively. Additional grounds for distinction of some of these decisions, for example, 39 Comp. Gen. 695 and Hamilton Watch Company, supra, may rest on the time and method of acquisition of the materials by the end product manufacturer. In this view, "manufacture" would commence at the time the end product manufacturer undertakes to fashion its product from materials it has acquired elsewhere for that purpose. Cf. 52 Comp. Gen. 886, 904 (1973). In the present case, acquisition occurs when CEC purchases the parts in the United States.

While Bristol also advances the "foreign component" argument espoused by E-Systems, it primarily contends that the legislative history shows that the intent of Congress in passing the act was to require 100-percent American assembly of the end product or at least "a substantial amount" of American assembly. Bristol believes that CEC's 10 to 15 percent manufacturing of the radio sets in the United States cannot be considered "substantial."

CEC suggests that our 1975 audit report, supra, ruled that its manufacturing did not violate the act, and contends that this position should not be reversed. However, our report stated that we had reservations whether CEC's manufacturing complied with the "manufactured in the United States" requirement. We recommended in the report that the Secretary of Defense amend ASPR to define and clarify the "manufactured in the United States" requirement. While Bristol maintains that no effort has been made to amend the ASPR, we understand that our recommendation has received and is receiving active consideration by the ASPR Committee.

The Army, in this regard, suggests that since the matter is before the ASPR Committee, it would be inappropriate for our Office to decide the issue in the present protest. In this connection, we note that in the recent decision in the matter of Davis Walker Corporation, supra, we repeated our recommendation that ASPR be amended to define and clarify "manufactured in the United States." Thus, the recommendation for ASPR Committee consideration of the issue has been made in the context of both our audit and protest functions. In these circumstances, we agree with the Army that further consideration of the issue in the present protest would be inappropriate. Accordingly, the protests of Bristol and E-Systems in regard to the Buy American Act issues are denied.

Conclusion

In view of the foregoing, the protests of Bristol and E-Systems are denied. CEC's protest is sustained insofar as the "Advertising v. Negotiation" issue is concerned and is otherwise denied.

Deputy Comptroller General
of the United States