01404

DECISION

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

FILE: B-186850 DATE: December 22, 1976

MATTER OF: Octagon Process, Inc.

DIGEST:

1. Where solicitation provided that offers may be submitted for less than specified quantity, bidder's failure to acknowledge amendment for increased quantity is minor irregularity and award may be made to bidder for lesser quantity.

2. Where agency determines that product is available only from foreign source, Buy American Act is inapplicable to that product.

3. Protest concerning affirmative determinations of responsibility will not be considered on merits.

Octagon Process, Inc. (Octagon) and Timmerman Corporation (Timmerman) separately protest award to any bidder other than themselves under Defense Supply Agency (DSA) IFB DSA400-76-B-4424, for decontaminating agent STB, NSN 6850-00-297-6653.

The original solicitation requested bids on a quantity of 1,604 drums of decontaminate. Although the quantity was increased by amendment to 2,834 drums, two bidders, Timmerman and Astro, submitted bids for 1,604 drums on an "all or nothing" basis. Octagon and Chemical Compound Incorporated (CCI) bid on the total increased quantity on an "all or nothing" basis. The order of bids, and range of unit prices, were as follows:

Timmerman	$24.30 - $24.50*
Astro	$25.88 - $27.78*
Octagon	$27.00 - $30.00*
CCI	$26.462 - $30.257*

(*Price per drum, depending upon destination and whether award is made FOB origin, or destination.)

DSA has determined that the "all or nothing" bids received for the total quantity are unreasonably high and it proposes to make award to Timmerman for 1,604 drums and resolicit for its remaining requirements.

Octagon contends that Timmerman's bid is nonresponsive because the firm failed to acknowledge the referenced amendment and because it failed to certify in its bid that a foreign end product would be furnished.

Although it appears that the amendment included changes in possible methods of delivery, as well as quantity, examination of those changes indicates that their only effect was to relax the delivery terms by permitting bidders to offer additional delivery terms. A bid which is responsive to the original solicitation also is responsive to the amended solicitation, except as to the entire increased quantity solicited. With regard to the increased quantity in the amendment, the solicitation incorporated the provisions of Standard Form (SF) 33A. Paragraph 10(c) of SF 33A provides that except as otherwise indicated:

> "* * * offers may be submitted for any quantities less than those specified; and the Government reserves the right to make an award on any item for a quantity less than the quantity offered at the unit prices offered unless the offeror specifies otherwise in his offer."

Because bidders were permitted to submit an offer for only 1,604 drums of decontaminate, Timmerman's failure to acknowledge the amendment would have no effect on price, quality, quantity, or

delivery terms for the quantity offered in its bid. Accordingly, this failure may be waived under Armed Services Procurement Regulation (ASPR) § 2-405(iv)(b) (1976 ed.).

Next, Octagon contends that it is the low responsive responsible bidder because it is the only bidder who correctly certified in its Buy American Certificate, paragraph 7 of Standard Form 33, that a foreign source and product would be supplied. It states that the primary ingredient of the decontaminate, chlorinated lime, which comprises more than 50 percent of the cost of all components, is not available from any domestic source. Timmerman, the proposed contractor, inserted "none" in its certificate thereby indicating it's intention to furnish a domestic end product.

Subsequent to bid opening, DSA made a formal determination that chlorinated lime is unavailable in the United States in adequate and sufficient commercial quantities. In this connection the Buy American Act has no application to an end product which is determined to be unavailable from domestic sources, or to unavailable components of domestically manufactured end products. 41 U.S.C. § 10a (1970); ASPR § 6-103.2 (1976 ed.). A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind determined by the Government not to be mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. ASPR § 6-101(a). Although the record is unclear as to whether "chlorinated lime" is a component in the manufacture of the decontaminate, or the end product apart from packaging, the difference is of no consequence. In either case, failure to complete the Buy American Certificate does not render Timmerman's bid nonresponsive. If chlorinated lime is considered to be a component, it is a domestic component. (ASPR § 6-101(a).) An end product incorporating such a component would not be required to be evaluated as foreign merely because such a component is incorporated. On the other hand, if an end product itself is determined to be unavailable domestically, failure to list the item as an excluded end product is without consequence because the Buy American Act does not apply to such end products. ASPR § 6-103.2.

Although in a conference held by our Office in this matter Octagon expressed its concern that prior performance by some of the

bidders indicated that they would not comply with the requirements of the Buy American Act during performance of the contract, we note that compliance is a matter of contract administration, and moreover, questions going to a bidder's integrity relate to responsibility.

In that connection, Octagon further asserts that Timmerman will not, in fact, supply drums conforming to the required specifications. We are advised by DSA that the contracting officer has investigated this allegation and has satisfied himself that Timmerman will furnish a conforming product. In any event, Timmerman has not taken an exception to this requirement in its bid. Moreover, award to Timmerman would import an affirmative determination of responsibility. This Office, however, no longer reviews protests concerning affirmative determinations of responsibility, absent allegations of fraud on the part of contracting officials or other circumstances not applicable here. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. While we do consider protests involving negative determinations of the protester's responsibility in order to provide assurance against the arbitrary rejection of bids, affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of the procuring officials who must suffer any difficulties resulting by reason of a contractor's inability to perform.

Accordingly, Octagon's protest is denied. Award may be made to Timmerman if otherwise appropriate.

Deputy Comptroller General
of the United States