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DECISION



R. Klemm, Jr.

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

FILE: B-191003

DATE: June 6, 1978

MATTER OF: National Office Equipment Company

DIGEST:

1. Buy American Act applies to leases as well as purchases.
2. Procuring activity added Buy American Act differential to prices offered for 3-year lease of equipment, but did not award contract to low offeror. Solicitation also had several significant defects, i.e., no desired or required delivery date, no salient characteristics for brand name equipment and no common closing date for receipt of offers. Contract should be terminated for convenience of Government when an adequate substitute has been provided for. Procuring activity should purchase in accord with current needs in manner which assures least cost to Government, consideration of all eligible firms, and continuity of service.

The U.S. Army Training Center and Fort Dix issued a request for quotations (RFQ) soliciting offers on a brand name or equal basis for dictating and transcribing equipment. The offers were evaluated on the basis of a 3-year lease with an option to purchase the equipment at the end of the lease term. The RFQ requested that installation and maintenance costs be stated separately. The RFQ also requested that offerors include a trade-in price for the equipment being replaced.

Four firms submitted offers. The contracting officer applied the Buy American Act differential to those offers based on foreign-made products. After evaluating the offers, the contracting officer concluded that Dictaphone Corporation (Dictaphone) was the low offeror and that firm was awarded the contract.

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National Office Equipment Company (National) contends that the Buy American Act differential should be applied only to purchases of equipment and it questions the manner in which the Buy American Act differential was applied. The Department of the Army (Army) correctly points out that we have determined that the Buy American Act, 41 U.S.C. § 10(a) (1970), applies to leases. 46 Comp. Gen. 47 (1966). The Army also correctly states that the contracting officer erroneously determined that Dictaphone was the low offeror. The Army contends, however, that it has a valid contract with Dictaphone because Dictaphone did not contribute to the improper evaluation, and there is no evidence that Dictaphone was aware that the evaluation and award were improper.

Further, the Army contends that the contracting officer should be authorized to purchase the equipment from Dictaphone as soon as funds are available. In this regard, the Army states that if the offers had been evaluated for an outright purchase, Dictaphone would have been awarded the contract. Moreover, termination and resolicitation would result in substantial increase in costs since the procuring activity traded its used equipment to Dictaphone to reduce the cost of the lease; and termination of the contract would not be in the Government's best interest because the equipment is essential to the acquiring activity. Finally, the Army notes that the evaluation errors have been brought to the attention of the procuring activity, and the procuring activity has been advised not to procure similar equipment on the terms and conditions set forth in the RFQ.

It should be pointed out that the prospective contractors made an offer on a 3-year lease and, consequently, there is no way to determine which offeror would have been low if the procuring activity had issued a solicitation for the purchase of the equipment. If the procuring activity had solicited offers for the purchase of the equipment, the offerors may have offered different prices for trade-in, maintenance, and installation. There is no reasonable assurance that Dictaphone would have been the low offeror.

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Further, the solicitation was defective in several significant aspects: failure to (1) contain either a required or desired delivery date, (2) establish a common closing date for receipt of offers, and (3) set out the salient characteristics of the brand name items.

Given the admitted improper award to Dictaphone and the significant defects in the solicitation, we recommend that the contract with Dictaphone be terminated for the convenience of the Government when an adequate substitute has been provided for. The Army now desires to purchase the equipment directly from Dictaphone if funding becomes available. We do not believe this should be done as a matter of course. Rather, we recommend that the procuring activity acquire the equipment in a manner which assures the least cost to the Government, consideration of all eligible firms, and continuity of service.

By letter of today, we are advising the Secretary of the Army of our recommendations.

This decision contains recommendations for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.


Acting Comptroller General
of the United States