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Decision

Matter of: Sea Box, Inc.

File: B-420130; B-420130.2

Date: November 18, 2021

Ruth E. Ganister, Esq., Rosenthal and Ganister, LLC; for the protester.
Dennis Callahan, Esq., Rogers Joseph O'Donnell, PC, for W&K Containers, Inc., the intervenor.
John P. Patkus, Esq., and Samantha L. Meyer, Esq., Defense Logistics Agency, for the agency.
Emily R. O'Hara, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the validity of the awardee's representation that it supplied a domestic end product in its Buy American Act certification is denied where the agency reasonably relied on the certification.

DECISION

Sea Box, Inc., a small business of East Riverton, New Jersey, protests the issuance of a purchase order to W&K Containers, Inc., a small business of Mill Valley, California, under request for quotations (RFQ) No. SPE8ED-21-Q-1167, issued by the Defense Logistics Agency (DLA) for freight containers. Sea Box contends that the agency improperly evaluated the awardee's quotation as offering a domestic end product, as required by the Buy American Act (BAA), because the awardee's item is not a commercially available off-the-shelf (COTS) item, nor does the item meet the component test.

We deny the protest.

BACKGROUND

The solicitation, issued on August 19, 2021, as a small business set-aside, was an urgent requirement for 28 Tricon II freight containers.¹ Agency Report (AR), Tab 1, RFQ at 1. The procurement was conducted as a commercial item acquisition, using the procedures in parts 12 and 13 of the Federal Acquisition Regulation (FAR). COS/MOL at 2. The solicitation anticipated that the issuance of the purchase order would be made to the responsible vendor whose quotation represented the best value to the government, considering price and past performance. RFQ at 3.

As relevant here, the RFQ incorporated Defense Federal Acquisition Regulation Supplement (DFARS) section 252.225-7000, Buy American Statute -- Balance of Payments Program Certification, and DFARS section 252.225-7001, Buy American and Balance of Payments Program, into the solicitation.² RFQ at 18, 33. Section 252.225-7000 of the DFARS requires vendors to certify that their end products are one of the following: domestic, from a qualifying country, or foreign.³ DFARS 252.225-7000(c). A domestic end product is defined as an “end product manufactured in the United States if . . . [it satisfies the component test],⁴ or . . . [t]he end product is a COTS item.”⁵ DFARS 252.225-7001(a). If an end product is identified as a foreign end product, the agency must evaluate the quotation in accordance with part 225 of the

¹ “Tricons” are modular shipping containers, manufactured such that three individual containers may be coupled together to create a unit with the same size profile as a standard twenty-foot shipping container. Contracting Officer’s Statement and Memorandum of Law (COS/MOL) at 2.

² Generally, the Buy American Act restricts the purchase of supplies that are not domestic end products. FAR 25.101(a).

³ An end product “means those articles, materials, and supplies to be acquired under this contract for public use.” DFARS 252.225-7001(a). For purposes of DFARS section 252.225-7000, as well as the self-certification that it requires, the terms “commercially available off-the-shelf (COTS) item,” “component,” and “domestic end product,” have the meanings given in the Buy American and Balance of Payments Program--Basic clause of this solicitation [*i.e.*, DFARS section 252.225-7001(a)].” RFQ at 33 (citing DFARS 252.225-7000(a)).

⁴ For an item to satisfy the component test, “[t]he cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States [must] exceed[] 50 percent of the cost of all its components.” DFARS 252.225-7001(a).

⁵ A commercially available off-the-shelf (COTS) item is any item of supply that is a commercial item, sold in substantial quantities in the commercial marketplace, and offered to the government in the same form in which it is sold in the commercial marketplace. DFARS 252.225-7001(a).

DFARS, which instructs the agency to apply a 50 percent evaluation factor to a quotation if the low priced quotation is a foreign quotation that is not exempt from the Buy American or Balance of Payments Program.⁶ DFARS 252.225-7000(b)(1); see DFARS 225.502(c)(ii)(E).

DLA received two quotations in response to its solicitation, one from Sea Box (\$275,324) and one from W&K (\$223,972). COS/MOL at 6. In its quotation, W&K identified itself as a dealer of containers manufactured by a domestic company ([DELETED]), and listed the manufacturer's commercial and government entity (CAGE) number. AR, Tab 5, W&K Quotation at 2. In the Buy American Act -- Balance of Payments Program Certification section of its quotation, W&K identified its containers as "Domestic End Products." *Id.* DLA issued the purchase order to W&K on August 24. AR, Tab 2, Purchase Order at 1. Sea Box filed this protest with our Office on September 3.⁷

DISCUSSION

The protester primarily alleges that the awardee's quoted end product is not a domestic end product because the item does not meet the component test and does not qualify as a COTS item. Protest at 5-6. Thus, according to the protester, the agency should have treated W&K's product as a foreign end product and applied a 50 percent evaluation factor in accordance with section 225.502(c)(ii)(E) of the DFARS. *Id.* Sea Box contends that had the agency investigated W&K's COTS status and applied the 50 percent evaluation factor, Sea Box's price would have been lower than W&K's price. *Id.* at 6. Further, Sea Box argues that, at a minimum, the agency should have inquired into W&K's COTS eligibility prior to award, specifically whether W&K sold its TRICON II containers in substantial quantities in the commercial marketplace, because "the Agency [was] well aware that W&K ha[d] in the past, and even as recently as 2021, formally but erroneously certified on federal solicitations that its containers [met] the Buy American Act and qualify as COTS items." *Id.* at 7; Comments at 2.

The agency responds that it reasonably relied on W&K's BAA self-certification. DLA affirms that W&K named a domestic company as the manufacturer of its Tricon II containers and certified that it would be supplying a domestic end product. COS/MOL at 8. According to DLA, the agency had no reason to request additional supporting documentation regarding W&K's COTS status because the agency had no reason to

⁶ An "evaluation factor of 50 percent" refers to the cost added to the foreign offer's quoted price. DFARS 225.105(b); FAR 25.105(b). An agency must multiply the vendor's quoted price by 50 percent and add that total to the vendor's quoted price. See DFARS 225.504 (Evaluation Examples).

⁷ On September 10, 2021, the Head of Contracting Activity for DLA notified GAO that it had authorized an override of the stay required by the Competition in Contracting Act (CICA). AR, Tab 13, Notice of CICA Stay Override at 1. W&K completed performance of this order on September 23. AR, Tab 16, Delivery Confirmation.

believe that W&K's BAA certification contained a misrepresentation. *Id.* We have considered all arguments and find no basis upon which to sustain the protest.

As a general matter, when a vendor or offeror represents that it will provide domestic end products in compliance with the Buy American Act, it is obligated to comply with that representation. *New York Elevator Co., Inc.*, B-250992, Mar. 3, 1993, 93-1 CPD ¶ 196 at 1. If, prior to award, an agency has reason to believe that a firm will not provide domestic products, the agency should go beyond a firm's representation of compliance with the BAA. *Id.* Where a contracting officer, however, has no information prior to award that would lead to the conclusion that the product to be furnished is not a domestic end product, the contracting officer may properly rely upon an offeror's self-certification without further investigation. *Leisure-Lift, Inc.*, B-291878.3, B-292448.2, Sept. 25, 2003, 2003 CPD ¶ 189 at 3; see also *Pacific Lock, Co.*, B-405800, Dec. 27, 2011, 2011 CPD ¶ 286 at 2. Unsupported allegations that a competitor's product is not in compliance with its Buy American Act certification do not impose an obligation on the contracting officer to conduct a detailed investigation behind that certification. *Cryptek, Inc.*, B-241354, Feb. 4, 1991, 91-1 CPD ¶ 111 at 4. Following award, whether an offeror does in fact furnish a foreign end product in violation of its certification is a matter of contract administration. *Id.*

Here, we find unobjectionable the agency's reliance on the awardee's BAA certification. In its quotation, W&K affirmed that it would furnish a domestic end product and provided the CAGE number of its domestic manufacturer located in Houston, Texas. AR, Tab 5, W&K Quotation at 2. Thus, DLA reasonably ascertained that, on its face, W&K's quotation presented no questions regarding the validity of its BAA certification. See *New York Elevator Co.*, *supra*; *Pacific Lock Co.*, *supra*.

Sea Box asserts that it was unreasonable for DLA to rely on W&K's BAA certification because "the agency was on very specific notice from Sea Box" that W&K's BAA certification was invalid because W&K's item was not COTS eligible. Comments at 2. The protester asserts that the "specific notice" was provided from (1) a prior GAO protest that was filed and withdrawn by W&K in 2021, and (2) an email exchange between Sea Box and DLA representatives in June 2021. *Id.*; see Comments, exh. E, June 2021 Emails; Protest at 7.

Sea Box contends that DLA was on notice that W&K's Tricon containers were not domestic end products because DLA was involved in a prior protest filed by W&K--in which Sea Box intervened--regarding domestic end products and COTS eligibility for a different procurement. Protest at 7. Although the protester argues that the prior protest was "fundamentally similar" to this protest, we disagree. *Id.* First, that prior protest involved an unrelated procurement for Quadcon containers, not Tricon containers as required here.⁸ Second, that prior protest was withdrawn by W&K. Therefore, our

⁸ Both the protester and the agency agree that Quadcon and Tricon containers are separate, distinct items. Agency Resp. to Additional Development (AD) at 3 n.4

Office never addressed the merits of the allegation raised in that protest.⁹ Thus, in referring to this prior protest that was withdrawn by W&K, where neither the agency nor GAO formally determined that W&K's Quadcon containers were not COTS eligible, the protester does not offer substantive evidence establishing that W&K ever misrepresented its end product status on its BAA certification. See *Cryptek, Inc., supra* at 2, 4 (finding that protester's statement that there was pending litigation for another procurement regarding the domestic end product status of its competitor's item, without more detail, was not sufficient support for its allegation). The fact that the agency was involved in an unrelated protest challenging the COTS status of W&K's Quadcon containers did not sufficiently put DLA on notice to question whether W&K's Tricon containers--an entirely separate item for a completely different procurement--would be a domestic end product for the purposes of its BAA certification, especially in light of the fact that the protest was withdrawn and the merits of the protest were never decided.

The protester also argues that DLA received sufficient information to question W&K's BAA certification from certain emails sent between Sea Box and DLA representatives in June 2021. In those emails, the protester questioned DLA's evaluations of (different)

("Quadcon storage containers significantly differ from Tricons."); Comments at 4 ("We note in particular that the Quadcon containers listed by W&K are significantly different from the Tricon containers.").

⁹ In that prior protest, W&K challenged its non-selection for award of a purchase order, contending that W&K's quoted Quadcon containers were, in fact, COTS eligible and should have been evaluated as domestic end products. B-419645, Protest at 6. In that protest, the agency asserted "out of an abundance of caution"--and notably, not because the agency suspected W&K of providing an invalid certification--the agency requested that W&K submit information about its domestic end product status, prior to award. B-419645, COS/MOL at 19. In its agency report for that protest, DLA explained that, at the time of evaluation, it could not determine whether W&K's end product was domestic because the firm never provided documentation to the agency supporting its COTS status. *Id.* at 20. Because W&K withdrew its protest, our Office has never expressed any opinion regarding the merits of that protest.

Sea Box now suggests that because DLA, in that prior protest, requested COTS information from vendors prior to award, DLA should have done the same in this acquisition. Protester Resp. to AD at 2. According to the protester, "the agency [here] affirmatively chose not to demand proof of compliance from the . . . competitors." *Id.* The protester, however, cannot cite to any procurement law or regulation that requires an agency to, as a matter of course, "demand proof of compliance" of a vendor's BAA certification as a routine part of its evaluation. Rather, as our decisions have consistently stated, an agency is not required to look behind a vendor's certification prior to award, absent a belief that a vendor's BAA certification is invalid. *Leisure-Lift, supra*; see also *Omni2Max*, B-419445, Mar. 4, 2021, 2021 CPD ¶ 114 at 5 ("[E]ach procurement stands alone, and actions taken in a different procurement are not relevant to our consideration of the agency's actions in this procurement.").

awardees' quotations in four separate procurements.¹⁰ In addition to taking issue with those awardees' quotations in the different procurements, Sea Box indicated that it "[did] not believe that W&K sells TRICONS in substantial quantities in the commercial marketplace."¹¹ Comments, exh. E, June 2021 Emails at 24.

Notably, Sea Box provided no factual information in those emails to support its allegations that W&K's products were neither COTS eligible nor could they qualify as domestic end products. Simply put, unsupported allegations lodged by a competitor that another competitor's products--in unrelated procurements--were not in compliance with its Buy American Act certification does not impose an obligation on the contracting officer to conduct a detailed investigation behind that certification.¹² *Cryptek, Inc., supra* at 4; *cf. Leisure-Lift, supra* at 4 (looking behind the awardee's certification when protester not only alleged that awardee was supplying a foreign end product, but also provided a photograph showing awardee's shipping boxes, which were clearly labeled "Made in Taiwan").

¹⁰ Only one of the four procurements at issue was awarded to W&K. Comments, exh. E. Sea Box did not file protests of these four procurements with our Office.

¹¹ In the chain of June 2021 emails that spanned several weeks, the protester specifically mentions W&K and its COTS eligibility in only a few instances. See *generally* Comments, exh. E, June 2021 Emails. More generally, Sea Box requested that the agency change its procurement procedures to require vendors to provide written evidence of COTS eligibility for purposes of BAA certification prior to award. *Id.* at 24. The agency notes that Sea Box "routinely contacts the Agency, sometimes daily, to complain about its competitors or suggest approaches the contracting staff might use for containers procurements." Agency Resp. to Req. for AD at 1 n.2.

¹² Sea Box contends that the emails and prior protest sufficiently notified the agency of W&K's alleged BAA misrepresentation because "communications were given by Sea Box to the same procurement group within the agency that handled this procurement." Comments at 2. Even if we did find the protester's email allegations to be supported with sufficient evidence to trigger an agency investigation into W&K's certification--which we do not--the protester still presents no evidence to support a contention that the contracting officer for this procurement had direct knowledge of the representations made by the protester in June 2021, or took part in the prior protest cited by Sea Box.

We will not infer that informing one agency representative of a potential reason to question a BAA certification imputes that knowledge to other officials within the agency. To the extent that the protester requests that we impute knowledge obtained through a prior withdrawn protest or a general email that discussed four prior solicitations to the contracting officer who oversaw this acquisition, we decline to do so. See *Morgan Bus Consulting, LLC*, B-418165.6, B-418165.9, Apr. 15, 2021, 2021 CPD ¶ 171 at 7 (declining to impute the knowledge of one contracting officer in an unrelated, prior procurement to the contracting officer for that specific acquisition).

Through its certification and the subsequent issuance of the purchase order, W&K is bound to comply with the Buy American Act. *Cryptek, Inc., supra*. To the extent Sea Box alleges that W&K breached that duty, that issue is a matter of contract administration, which is not subject to resolution under our Bid Protest Regulations. *Id.*

The protest is denied.

Edda Emmanuelli Perez
General Counsel