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DECISION



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

[Protest Alleging IFB Violates Buy American Act]

FILE: B-199307

DATE: August 22, 1980

MATTER OF: Air Plastics, Inc.

DIGEST:

1. Use of foreign brand name supplies as basis for brand name or equal procurement does not violate Buy American Act since Act does not totally preclude purchase of foreign equipment and in any event, Act has been waived for equipment manufactured in foreign countries in question.
2. Allegation that DOD Determination & Findings exempting purchase of defense materials from Denmark and United Kingdom from application of Buy American Act cannot take precedence over Act of Congress is without merit where exemption is based on statutory authority conferred by Buy American Act and DOD Appropriation Authorization Act, 1976, as amended.
3. Protester has not met burden of affirmatively proving its case that Determination & Findings exempting foreign materials from Buy American Act do not apply to instant procurement when Determination & Findings by their terms apply to all items of defense equipment other than those specifically excluded and protester has provided no evidence to support bare allegation that equipment is excluded from coverage.
4. Allegation that specifications in brand name or equal procurement lack sufficient detail to enable protester to submit bid is without merit where solicitation clearly sets forth salient characteristics of brand name equipment and protester has not identified any

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specific portions of such specifications which it considers lacking in detail.

Air Plastics, Inc. (Air Plastics) protests invitation for bids (IFB) No. DLA-700-80-B-1157 issued by the Defense Construction Supply Center (DCSC), Defense Logistics Agency, Columbus, Ohio. Specifically, Air Plastics contends that the IFB violates the Buy American Act (Act) because it calls for a product manufactured virtually entirely in a foreign country. In addition, Air Plastics argues that the specifications are lacking in sufficient detail to enable it to submit a bid.

The IFB was issued on April 1, 1980 and requested bids on 14 Vacuum Dust Collectors, Nilfisk Asbesto-Clene System Model No. GA-73 or equal. The original bid opening date of May 1, 1980 was extended to May 15, 1980 at Air Plastics' request. Award is being withheld pending resolution of the protest by this Office.

With regard to Air Plastics' first basis of protest, DCSC points out that the Act has been waived for supplies manufactured in both Denmark and the United Kingdom (U.K.) where portions of the Nilfisk Asbesto-Clene System are manufactured. Air Plastics asserts, however, that a Defense Department determination to waive the Act cannot take precedence over an Act of Congress and that the exception determination does not apply to the instant procurement.

The 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. § 10(a) (1976). Executive Order No. 10582, December 17, 1954, as amended, which establishes uniform procedures for determinations, 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 therein. The Order further provides that the price of domestic articles is unreasonable if it exceeds the cost of like foreign articles plus a differential. The Act and Executive Order

are implemented within the Department of Defense (DOD) by section VI of the Defense Acquisition Regulation (DAR), which provides for a percentage additive factor for evaluation purposes to be applied to offers of nondomestic source end products. DAR § 6-104.4 (1976 ed.).

Thus, we note at the outset that the Act as implemented does not, as Air Plastics suggests, absolutely prohibit the procurement of foreign supplies. Rather, it establishes a preference for domestic supplies by requiring that a differential be added to the price bid on any equipment of foreign origin. Furthermore, we are unaware of any provision of the Act, Executive Order or regulations which would prohibit basing a brand name or equal procurement upon foreign brand name supplies.

In any event, as DCSC states, the Act has been waived for equipment manufactured in Denmark and the U.K., where portions of the Nilfisk system are manufactured. (For purposes of argument, DCSC has assumed that the Nilfisk system is a foreign end product.) Pursuant to Memoranda of Understanding (MOU) with Denmark and the U.K., dated January 30, 1980 and September 24, 1975 respectively, DOD has issued Secretarial Determination & Findings (D&F) dated May 9, 1980 and November 24, 1976, exempting the purchase of defense materials from Denmark and the U.K. from application of the Act.

The determinations in the D&F are based on the statutory authority conferred upon department heads by the Buy American Act to exempt from the application of the Act those products for which it is determined such exemption would be in the public interest. They are further based on the authority of the Secretary of Defense under section 814(a) of the DOD Appropriation Authorization Act, 1976 (89 Stat. 544), as amended by section 802 of the DOD Appropriation Authorization Act, 1977 (90 Stat. 930), authorizing the Secretary of Defense to determine that waiver of the Act would be in the public interest when it is necessary to procure equipment manufactured outside the United States in order to acquire NATO standardized or interoperable equipment for the use of the United States in Europe. Therefore, we find no merit to Air Plastics' argument that the DOD determination to waive the Act is unauthorized. See Self-Powered Lighting, Ltd., B-195935, March 13, 1980, 80-1 CPD 195.

In addition, we are unable to conclude that the exception determinations do not apply to the instant procurement, as Air Plastics asserts. The subject D&F's cover all items of Danish or U.K. produced or manufactured defense equipment other than those excluded under the MOUs or subject to legally imposed restrictions on procurement from non-national sources. Air Plastics has provided no evidence to support its bare allegation that the equipment being procured is not within the coverage of the D&Fs and we know of nothing in the MOUs or any law or regulation which would exclude this equipment from coverage. In this regard, we note that the protester has the burden of affirmatively proving its case and we cannot conclude that Air Plastics' allegation meets its burden in that regard. The Nedlog Company, B-195963, January 10, 1980, 80-1 CPD 31.

Air Plastics' second basis of protest is that the specifications are deficient. Specifically, Air Plastics alleges that DCSC would not provide it with sufficient information on which it could submit a bid.

In this regard, DCSC points out that this is a brand name or equal procurement and that it complied with the applicable regulation for such procurements, DAR § 1-1206.2, by clearly listing the salient characteristics of the brand name product in the solicitation. DCSC also indicates that at Air Plastics' request, the bid opening date was extended by an additional 10 days in order to allow Air Plastics time to obtain additional commercial data which Air Plastics believed was needed in order to submit its bid.

We have held that bidders offering "equal" products should not have to guess at the essential qualities of the brand name item. Under the regulations they are entitled to be advised in the invitation of the particular features or characteristics of the referenced item which they are required to meet. 48 Comp. Gen. 441 (1968).

In this case, the salient characteristics of the relevant Nilfisk system are clearly set forth in Section F of the solicitation. For example, Section F advises potential offerors that the desired equipment is a vacuum dust collector and enclosure for automotive brake work controlling air-borne asbestos fibers in the work area equal to Nilfisk Asbestos-Clene System Model No. GA-73, 400 cylinder and 600 cylinder.

Section F further advises that the system must be equipped with high efficiency air filters having a specified retention efficiency and that it must have a specified minimum exhaust rate and an exhaust hood capable of effectively preventing the escape of asbestos during compressed air cleaning of brake assemblies. The means by which such effectiveness must be tested and demonstrated are also stated. Section F goes on to describe several other features of the system which are deemed to be essential.

Air Plastics has not identified any portion of these specifications which it considers lacking in sufficient detail and thus has provided no support for its general allegation. Thus, we must conclude on the basis of the record before us that there is no merit to the contention that the specifications are inadequate.

The protest is denied.

Henry R. Van Cleave

For The Comptroller General
of the United States