

DECISION

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

FILE: B-206340; B-206340.2 DATE: January 10, 1983

MATTER OF: Platt Manufacturing Corporation; National
Forge Company

DIGEST:

1. Even though prospective subcontractor, protesting alone, would not be an interested party for purposes of filing a bid protest, when competitor for prime contract and prospective subcontractor have both protested directly to GAO on the same issue, GAO will consider protests.
2. When applicable Appropriation Act and regulations provide an exception to requirement for procurement of specialty metals from domestic sources, and awardee falls within the exception because it is located in a country which is a party to a memorandum of understanding with the United States, award is not contrary to the Act.

Platt Manufacturing Corporation and National Forge Company protest the award of a contract to Brown Brothers and Company, Ltd. of Edinburgh, Scotland, under request for proposals No. N00140-81-R-5466, issued by the Naval Regional Contracting Office, Philadelphia, Pennsylvania. The solicitation covers a quantity of 352 catapult power cylinders, two-thirds of which are for the CVN 71 aircraft carrier, now under construction at Newport News, Virginia; the remainder are for a foreign military sale to France.

The protesters contend that the award was improper since the cylinders are made of specialty metals¹ and do not fall within any of the exceptions to the statute and regulations that require such metals to be procured domestically.

¹

As defined in Defense Acquisition Regulation § 6-301(c)
(DAC 76-21, October 31, 1980).

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We deny the protest, noting that National Forge, as a prospective subcontractor of Platt, is not an interested party for purposes of filing a bid protest under our procedures, 4 C.F.R. § 21.1(a) (1982). This is because Platt, a competitor for the prime contract, was neither acting by or for the Government in selecting the subcontractor, and National Forge does not otherwise qualify as interested under the criteria outlined in Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166. However, since Platt has protested directly to our Office on the same basis, and has specifically adopted National Forge's submissions as its own, we have considered both protests. Compare American Satellite Corporation, B-189551, March 6, 1978, 78-1 CPD 171, aff'd on reconsideration, April 17, 1978, 78-1 CPD 289 (dismissing a subcontractor protest in which the prime contractor did not join).

The question presented by both protesters is whether that portion of the contract obligating U.S. funds for the procurement of articles containing specialty metals can be awarded to a foreign concern.

The funds involved here were made available by the Department of Defense Appropriation Act, 1980, Public Law 96-154, approved December 21, 1979, 93 Stat. 1139. The section of the Act entitled "Shipbuilding and Conversion, Navy" includes funds for the CVN Nimitz class aircraft carrier program. These funds remain available for obligation until September 30, 1984, although the Navy advises us that for this procurement funds were obligated at the time the award was made.

Section 724 of the Act establishes a preference for domestic specialty metals, but includes the following exceptions:

* * * * nothing herein shall preclude the procurement of specialty metals * * * produced outside the United States or its possessions when such procurement is necessary to comply with agreements with foreign governments requiring the United States to purchase supplies from foreign sources for the purposes of offsetting sales made by the United States Government or United States firms under

approved programs serving defense requirements or where such procurement is necessary in furtherance of the standardization and interoperability of equipment requirements with NATO * * *."

The protesters argue that these exceptions, permitting procurement of specialty metals from foreign sources, do not apply to this procurement. Specifically, Platt alleges that because the exceptions are not contained in Section 723 (covering specialty metals) of the Department of Defense Appropriation Act, 1982, Public Law 97-114, approved December 29, 1981, 95 Stat. 1565, and because best and final offers were not due until January 6, 1982, the exceptions cannot be applied here. In addition, National Forge argues that the NATO standardization exception does not apply in any case since the nuclear aircraft carriers for which the cylinders are being procured are not "NATO general purpose forces equipment expected to be used in the European area." The firm argues that a 1977 Department of Defense Directive, quoted during hearings on standardization before the 95th Congress, shows that Congress intended to limit application of an exception similar to this one to such equipment.

Our analysis of the applicable statute and regulations leads us to conclude that these arguments are without legal merit. First, as noted above, the 1980 Appropriation Act applies to this procurement. Second, Defense Acquisition Regulation (DAR) § 6-303(xi) (DAC 76-28, July 15, 1981) provides that the Department of Defense Appropriation Act preference for domestic specialty metals does not apply to the following:

"* * * purchases necessary to comply with agreements with foreign governments requiring the United States to purchase supplies from foreign sources for the purposes of offsetting sales made by the U.S. Government or U.S. firms under approved programs serving defense requirements or where such acquisition is in furtherance of an agreement with a qualifying country * * *."
(Emphasis added.)

The cylinders to be delivered here constitute an acquisition in furtherance of an agreement with a qualifying country. DAR § 6-001.5(d) defines a qualifying country as including participating countries, which in turn are listed in DAR § 6-1401. The United Kingdom is a participating country, since it has entered into a Memorandum of Understanding (MOU) with the United States which removes foreign acquisition restrictions with regard to purchases of defense equipment by either party from the other.

Our Office has previously held that this MOU constitutes both an "approved program serving defense requirements" and an "agreement with a foreign government" requiring the United States to purchase supplies from United Kingdom concerns in order to offset sales made to the United Kingdom. Dosimeter Corporation of America, B-189733, July 14, 1978, 78-2 CPD 35. In Dosimeter, we interpreted the provision requiring purchase of domestic specialty metals in the 1978 Department of Defense Appropriation Act as not being applicable to procurements from the United Kingdom.

The exceptions contained in the 1978 Act are identical to those in section 724 of the 1980 Act. Moreover, the MOU is applicable to the protested procurement since, by its terms, it came into operation on September 24, 1975 and is to remain in effect until January 1, 1985. See DAR § 6-1406.2. Since Brown Brothers is located in a United Kingdom country, the exception permitting procurement of specialty metals from a foreign source clearly applies to it.

Finally, despite the protester's arguments to the contrary, the cylinders being procured are not on the list of defense equipment items excluded from operation of the MOU. See DAR § 6-1405.

The protest is denied.

Milton J. Fowler
for Comptroller General
of the United States