



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

Mr. Lester P.H.T.
11375

IN REPLY
REFER TO:

B-192907

September 12, 1979

Do not make available to public reading

The Honorable Barry Goldwater
United States Senate

Dear Senator Goldwater:

We refer to your letter dated July 9, 1979, in which you requested a response from our Office to the matters raised in the letter that you enclosed from *by* Mr. John Carlson of M. M. Sundt Construction Company] *DLG 02727* (Sundt). As you are aware, this matter was the subject of our decision concerning a protest filed by Sundt's subsidiary, C. R. Fedrick, Inc. See C. R. Fedrick, Inc. *DLG 01491* B-192907, May 4, 1979, 79-1 CPD 309.

With respect to Mr. Carlson's complaint that a foreign manufacturer can come to the United States and operate as a Federal contractor without any experience or prequalification, we would like to point out that no Federal contract may be awarded to any person or firm unless the contracting officer first makes an affirmative determination that the prospective contractor is responsible. Defense Acquisition Regulation (DAR) § 1-904.1 (1976 ed.) and Federal Procurement Regulations (FPR) § 1-1.1204-1 (1964 ed.). Before making this determination of responsibility, the contracting officer is required to have in his possession information sufficient to satisfy himself that the prospective contractor has, among other things, adequate financial resources; a satisfactory record of performance; a satisfactory record of integrity and business ethics; an ability to comply with the delivery or performance schedule; and, is otherwise qualified and eligible to receive an award under applicable laws and regulations. DAR § 1-903 and FPR § 1-1.1203.

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Letter

As to Mr. Carlson's second objection regarding the procurement of manufactured goods from a foreign country (Japan) without there being a quid pro quo, it is not the normal practice for the Federal Government to procure goods from foreign sources. The Buy American Act at 41 U.S.C. § 10a (1976) states that unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, articles acquired for public use shall have been mined, produced, and manufactured in the United States. Also, where the item is for use outside the United States, there are Government procurement regulations which prescribe the policies and procedures to further the Balance of Payments Program for such procurements. DAR §§ 6-800 to 6-806 and FPR §§ 1-6.800 to 1-6.806. The purpose of this program is the reduction of dollar expenditures outside the United States.

Under the Buy American Act, the determination of whether a particular purchase from a domestic source is inconsistent with the public interest is a matter of discretion vested in the head of the Federal department or agency concerned. This decision, which often requires the balancing of conflicting policies, is not reviewed by our Office. Keuffel & Esser Company, B-193083, July 17, 1979, 79-2 CPD 35. For example, an agency may enter into a Memorandum of Understanding (MOU) with a foreign country whereby that agency will attempt to place contracts on a competitive basis with the foreign country in order to offset substantial purchases by the foreign country from United States sources. See Dosimeter Corporation of America, B-189733, July 14, 1978, 78-2 CPD 35. We do not then question the agency's discretion in applying the terms of the MOU to a particular procurement.

Similarly, we do not question the determinations by the head of an agency which approve deviations from Government procurement regulations so as to eliminate the Balance of Payments differential in favor of United States suppliers overseas. Continental Electronics Mfg. Co., B-193810, February 14, 1979, 79-1 CPD 107. The procurement regulations also authorize the head of an agency to allow a deviation from such regulations. See DAR § 1-109 and FPR § 1-1.009.

In any event, the solicitation protested by C. R. Fedrick was not one merely involving the procurement of manufactured goods. In addition to calling for the furnishing of motor-driven pumping units and valves, the solicitation also required that these items be installed at pumping plants located at Hacienda and Twin Lakes, Nevada. FPR § 1-18.602-1 explicitly states that only domestic construction material shall be used in the performance of construction contracts in the United States except for particular material for which it is determined: (1) by the agency head that it is impracticable to make such a requirement; (2) in accordance with agency procedures that domestic construction material of satisfactory quality is unavailable in sufficient commercial quantities; or (3) in accordance with FPR § 1-18.603 that such requirement would unreasonably increase cost.

C. R. Fedrick's protest essentially revolved around the propriety of the Bureau of Reclamation's determination that the use of domestic pumping units would unreasonably increase the cost of the procurement. FPR § 1-18.603-1 provides that this determination be made on the basis that the cost of each item of nondomestic construction material offered in the bid plus 6 percent be less than the cost of comparable domestic construction material and on the basis that the bid be lowest after adding, for evaluation purposes, 6 percent of the cost of the nondomestic construction material.

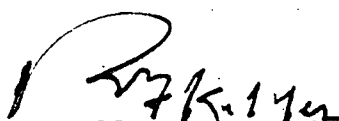
We do note that Public Law 96-39, 93 Stat. 246 (96th Cong., 1st Session), the Trade Agreements Act of 1979, will in the future provide much of the quid pro quo that Mr. Carlson desires. This act implements the General Agreement on Trade and Tariffs (GATT) signed by 41 nations on April 12, 1979, in Geneva, Switzerland. In particular, the Government Procurement Code section of the GATT contains rules designed to discourage discrimination against foreign suppliers when governments purchase articles for their own use. The Code also contains dispute settlement procedures by which the United States can complain and secure reviews and international adjudication of foreign violations of the Code rules that adversely affect United States competitive opportunities.

Finally, in response to Mr. Carlson's objection to the Bureau of Reclamation putting out a bid package over-weighted in manufactured items, we recognize that the installation portion of the procurement protested by C. R. Fedrick could possibly have been separated from the portion that required the furnishing of the motor-driven pumping units. For that matter, the pumping units for Twin Lakes might also presumably have been procured separately from the pumping units for Hacienda Lake. However, we have stated that the decision whether to procure by means of a total approach as opposed to separate procurements is a matter for the procuring agency to determine. Allen and Vickers, Inc., et al., 54 Comp. Gen. 445, 452 (1974), 74-2 CPD 303. In the absence of clear evidence showing such determination lacked a reasonable basis, it will not be disturbed by our Office. 53 Comp. Gen. 270 (1973).

Furthermore, C. R. Fedrick had the opportunity to protest prior to bid opening the Bureau of Reclamation's procurement approach. Under our Bid Protest Procedures, protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening shall be filed prior to that date. 4 C.F.R. § 20.2(b)(1) (1979). We think that the Bureau of Reclamation's decision to procure and install pumping units for both Twin Lakes and Hacienda Lakes should have been apparent from the face of the solicitation itself. Moreover, had this matter been raised in the context of a timely protest to us, the Bureau of Reclamation would have provided in its protest report the facts upon which it based its particular procurement approach.

I trust the foregoing will be sufficient for you to respond to the matters raised by Mr. Carlson.

Sincerely yours,


Deputy Comptroller General
of the United States