DECISION

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

c61257

FILE: B-186124 DATE: August 2, 1976

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MATTER OF: Lemmon Pharmacal Company

DIGEST:

1. Buy American Act exception for supplies which are not commercially available in United States does not apply to end item, the component of which is produced by only one domestic source and is only sold by that source as incorporated into end item. Fact that other domestic manufacturers are required to purchase component from foreign sources does not make component unavailable within meaning of exception since agency is able to obtain unlimited quantity of end item from sole domestic source.

2. Fact that manufacturer of domestically manufactured end product may be foreign owned is not dispositive of whether product is foreign or domestic for purposes of applying Buy American Act evaluation factor.

3. With certain exceptions, Balance of Payments program requires that Buy American Act evaluation factors be applied to foreign made products even if purchased for use outside United States.

4. Although DOD regulation announces expectation that application of 50 percent balance of payments evaluation factor to foreign bids will not be retained beyond time that United States balance of payments deficit is corrected, evaluation factor is for application notwithstanding bidder's contention that balance of payments deficit has been corrected, since DOD has not rescinded regulation.

5. Contention that agency should have requested deviation under ASPR § 6-102.2(b) from Buy American Act evaluation criteria contained in solicitation is untimely where issue was not raised until after proposals were submitted.

Lemmon Pharmacal Company (Lemmon) of Sellersville, Pennsylvania, protests the Defense Personnel Support Center's (DPSC) proposed award to CIBA Pharmaceutical Corporation (CIBA) under RFP DSA 120-76-R-1328 of a requirements contract

for an estimated annual procurement of 18,000 bottles of hydralazine hydrochloride tablets. DPSC considers CIBA's price to be low as a result of its evaluation pursuant to the Buy American Act procedures in the Armed Services Procurement Regulation (ASPR).

Pursuant to ASPR § 6-104.4(b), bids and proposals must be evaluated so as to give preference to domestic bids by adjusting such foreign bid for purposes of evaluation. A domestic bid or proposal is one which offers a domestic end product, that is, an end product which is manufactured in the United States where the cost of its components which are mined, produced or manufactured in the United States amounts to 50 percent or more of the cost of all its components. ASPR § 6-101(a), (c) and (e). Lemmon has stated that it will obtain the tablet's basic active ingredient, raw hydralazine HCl from Napp which in turn will purchase it from Yodogawa Pharmaceuticals, Ltd., of Osaka, Japan. Consequently, the contracting officer added to Lemmon's bid the 50 percent evaluation factor applicable to foreign end products, and determined that CIBA had submitted the lowest evaluated price.

The gravamen of Lemmon's complaint is that the Buy American Act should not have been applied because there exists no domestic source of the basic ingredient raw hydralazine HCl. It complains that CIBA is the only domestic manufacturer of raw hydralazine HCl, and that CIBA has taken that product off the domestic market, preventing Lemmon or any other interested bidder from purchasing the necessary raw material from any domestic source. Further, Lemmon argues that it is not in the public interest that CIBA should be permitted to monopolize this market solely because firms such as Lemmon are unable to obtain domestically produced raw hydralazine HCl. Lemmon also asserts that its low foreign proposal will involve substantially domestic expenditures and that since this is a major procurement (over $250,000) a deviation from the Buy American Act evaluation procedures should be effected pursuant to ASPR § 6-102.2(b).

Regarding Lemmon's concern that CIBA is being permitted to monopolize the market for hydralazine HCl tablets by controlling the availability of domestic raw hydralazine HCl, the Buy American Act, as implemented, does not preclude competition for foreign source end products, but establishes an evaluation preference for domestically manufactured products produced from domestically manufactured components.

The requirements and limitations on component availability are as follows:

> "* * * A component shall be considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind determined by the Government to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality." ASPR §§ 6-001(d) and 6-101(a).

This language is similar to that contained in the Act, 41 U.S.C. § 10a, which provides, inter alia:

> "* * * This section shall not apply * * * if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality."

Here it appears that raw hydralazine HCl is manufactured in the United States in sufficient and reasonably available quantities, and in "commercial" quantities sufficient to meet the Government's procurement needs of hydralazine HCl tablets. That is, it is conceded that CIBA can domestically manufacture sufficient quantities of the raw material to meet contract requirements, and that CIBA can produce essentially unlimited supplies of the end product for the Government. While Lemmon argues, in effect, that the legislative history of the Act requires the conclusion that by "sufficient and reasonably available commercial quantities" is meant commercial availability to more than one firm interested in competing for the Government's requirements, our review leads us to conclude that although "commercial quantities" was plainly taken to mean large or commercial sized lots or quantities of goods, nothing in the Act clearly precludes the construction which DPSC has applied. That is, "availability" means availability to the Government through the domestic manufacture of the required end product. As a general rule of statutory construction, statutory language is to be given its plain and unambigous meaning. In this regard, had the Congress so intended, it could easily have accomplished the broader anti-monopolistic purpose subscribed by Lemmon. However, such a construction

transcends the obvious intended purpose of the Act, that is, to give preference to domestic end items in Government purchases. Moreover, the procuring agency's position would appear to be consistent with the subsequent adoption of 41 U.S.C. § 10d, reemphasizing Congress's purpose that insofar as possible, domestic manufacture is to be preferred.

Lemmon also argues that consideration should be given to the fact that CIBA may be foreign owned, while Lemmon is not. However, under the present regulations this is not a factor in determining whether a bid or proposal is foreign or domestic. B-163684, May 1, 1968.

Lemmon further questions the application of the evaluation factor because much of the material to be supplied will in its opinion be used abroad. We have stated that the provisions of the Act should not be applied, at least where substantially all of the items procured are for use overseas. B-168333, May 27, 1970. Nevertheless, ASPR § 6-805.1 requires that for purposes of application of the balance of payments program the proposed procurement of supplies for use outside the United States be restricted to United States end products, except in circumstances not claimed to apply here. Unicare Health Services, Inc., B-180262, B-180305, April 18, 1975, 75-1 CPD 234; 49 Comp. Gen 176 (1969).

Lemmon points to ASPR § 6-102.2(a) which announces the expectation of the Department of Defense that the 50 percent balance-of-payment evaluation factor will not be retained "beyond the time when the United States balance of payments deficit is corrected." Lemmon argues that a balance of payments surplus may have been reflected over the past calender year. Notwithstanding this fact, the cited regulation has not been amended, and continues in effect. It is within the sound administrative discretion of the Department of Defense, not the GAO, to determine when the causes which gave rise to this provision no longer require its retention and to amend the regulation as deemed appropriate.

Finally, Lemmon claims that pursuant to ASPR § 6-102.2(b), a deviation from evaluation procedures should have been obtained. We note that the cited ASPR provision requires that a request for deviation should be made in advance of solicitation to permit the solicitation to describe the evaluation procedure to be used.

Essentially the protester is challenging the evaluation criteria of the solicitation. Since the issue was not raised until after proposals were submitted, under 4 C.F.R. § 20.2(b)(1) (1976 ed.) this aspect of the protest is untimely and will not be considered on the merits.

For the reasons stated, Lemmon's protest is denied.

R.F.Keller

Deputy Comptroller General
of the United States