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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: PDS Consultants, Inc.

File: B-297890

Date: April 4, 2006

Jean Y. Park, Esq., Kiley & Park, for the protester.

Angel Rosado for Caribe Opti Lab., Inc., an intervenor.

Merilee D. Rosenberg, Esq., and Philip Kauffman, Esq., Department of Veterans Affairs, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that award was improper because awardee would not supply goods that complied with Buy American Act is denied, where submission of offer constituted agreement to supply domestic end item, and agency had no information indicating otherwise.

DECISION

PDS Consultants, Inc. protests the award of a contract to Caribe Opti Lab., Inc. under solicitation No. 672-511-05, issued by the Department of Veteran Affairs (VA) for eye examinations and eyeglasses. PDS argues that the award to Caribe is improper because the eyeglasses it will supply will not be a domestic product as required by the Buy American Act, 41 U.S.C. §§ 10a-10d (2000).

We deny the protest.

The solicitation, issued as a total small business set-aside, incorporated the provision at Federal Acquisition Regulation (FAR) § 52.225-1, Buy American Act Supplies, which, in implementing the Act, requires that domestic end items be delivered under the contract, except to the extent that the offeror specifies delivery of a foreign

product.¹ Since the solicitation was a small business set-aside, and only domestic end products may be supplied under small business set-asides, FAR §§ 25.101(b), 19.102(f)(1), the solicitation also incorporated the provision at FAR § 52.219-6, which provides that the contractor agrees to furnish only end items manufactured in the United States (including its territories, possessions, Puerto Rico, the Pacific Islands and the District of Columbia) by small business concerns. The solicitation also included the provision at FAR § 52.225-2, which states: “The offeror certifies that each end product, except those listed in paragraph (f)(2) of this provision, is a domestic end product . . . ,” and provided space in paragraph (f)(2) for offerors to list any foreign end products they intended to supply. Finally, the solicitation provided that, if the offer were not submitted on Standard Form (SF) 1449, the offeror was required to include a statement specifying the extent of its agreement with all terms, conditions and provisions included in the solicitation. Solicitation at 49.

Several offers were received, including Caribe’s and PDS’s. PDS’s proposal, and those of the other offerors, were eliminated from the competition as technically unacceptable. Only Caribe’s offer was evaluated as acceptable overall. Regarding the Buy American requirement, since Caribe submitted its offer on SF 1449 and did not list any end products as being from foreign sources, VA evaluated Caribe’s offer as one for a domestic end item. VA thus made award to Caribe as the only acceptable offeror.²

PDS asserts that the award to Caribe was improper because Caribe will not supply eyeglasses that meet the definition of a domestic end item.

The award was proper. Under the terms of the provisions incorporated into the solicitation, offerors that did not take exception to the domestic end item requirement by listing foreign end products were certifying that they would comply

¹A domestic end item is defined as one that is manufactured in the United States where the cost of domestic components exceeds 50 percent of the cost of all components. FAR § 25.101.

²The agency maintains that, because PDS’s proposal was unacceptable, PDS would not be in line for award if the protest were sustained, and PDS therefore is not an interested party to maintain this protest. 4 C.F.R. § 21.0 (2005). However, since all proposals except Caribe’s were rejected as unacceptable, if the protest were sustained, Caribe would not be eligible for award and the agency would be required to resolicit the requirement. Since PDS would be eligible to compete on such a resolicitation, PDS is an interested party. Wilcox Indus. Corp., B-281437.2 et al., June 30, 1999, 99-2 CPD ¶ 3 at 5.

with the Act's domestic product requirements. The solicitation did not require any separate certification document unless the offer was not submitted on SF 1449. Therefore, Caribe's signed offer on SF 1449 indicated its intention to supply a domestic end item, and obligated the firm to comply with the requirement. Continental Forest Products, Inc., B-217548, Mar. 19, 1985, 85-1 CPD ¶ 324 at 4. It follows that the agency properly accepted the offer for award.

PDS maintains that VA should have investigated whether Caribe intended to supply a domestic end item, since PDS advised VA in a letter dated August 25, 2005 that several offerors under the solicitation would violate the Act. Letter from PDS to VA (Aug. 25, 2005), at 1-2. This argument is without merit. The contracting officer states that he was unaware of the letter in August (he states that he subsequently found the letter in his records), and thus had no reason to question any offeror's compliance with the Act. In any case, the letter did not specifically identify Caribe (or any other offeror) as a firm PDS believed would not supply a domestic end item. Thus, even if we would otherwise consider information from one offeror sufficient to impose on an agency an obligation to investigate another offeror's compliance with the Act, it is clear that the agency here had no such obligation because it did not have any information, or reason to believe, that Caribe would not furnish a domestic end product. We conclude that the agency reasonably relied upon Caribe's self-certification, without further investigation. Intermagnetics Gen. Corp., B-255741.2, B-255741.3, May 10, 1994, 94-1 CPD ¶ 302.³

The protest is denied.

Anthony H. Gamboa
General Counsel

³ Whether Caribe in fact complies with the requirement to supply a domestic end item is a matter of contract administration, for consideration by the agency, not our Office. Envirodyne Sys., Inc., B-258045, Dec. 8, 1994, 94-2 CPD ¶ 228 at 3.