G A O
Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: City Chemical LLC

File: B-296135.2; B-296230.2

Date: June 17, 2005

Gary Marcus, Esq., Goldberg & Connolly, for the protester.
Charles H. Carpenter, Esq., and Michael L. Hordell, Esq., Pepper Hamilton LLP, for Nation Ford Chemical Company, an intervenor.
Jeffrey I. Kessler, Esq., U.S. Army Materiel Command, and Sandra L. Biermann, Esq., U.S. Army Field Support Command, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly evaluated dye that protester proposed to furnish as a foreign end product where imported "raw" dye accounted for more than 50 percent of the cost of all components making up the dye.

DECISION

City Chemical LLC protests the award of contracts to Nation Ford Chemical Company under two solicitations issued by the U.S. Army Operations Support Command, request for proposals (RFP) No. DAAA09-03-R-3017 for solvent yellow dye 33 and RFP No. DAAA09-03-R-3019 for solvent green dye 3. With regard to both RFPs, City Chemical contends that the agency erroneously determined that it intended to furnish a foreign source end item and, as a consequence, improperly added a Buy American Act (BAA) differential to its price.

We deny the protests.

BACKGROUND

Each of the solicitations contemplated the award of a fixed-price requirements contract to the offeror submitting the lowest-priced, technically acceptable proposal at a fair and reasonable price. Both advised that offers would be evaluated by giving preference to domestic end products and qualifying country end products over nonqualifying country end products; to permit this evaluation, offerors were asked to certify as to the status of their end products. Elsewhere in both RFPs, offerors were

asked to certify that their article was manufactured in the United States and that the cost of domestic components exceeded 50 percent of the cost of all components.

Both the protester and Nation Ford responded to both RFPs. In both its offers, City Chemical represented that its end product was a qualifying country end product (as opposed to a domestic end product); in both cases, it then--inconsistently---identified "USA" as the country of origin for the end item. In its proposal for the green dye, the protester completed the second of the above certifications by writing "yes" next to "the article is manufactured in the United States," crossing out the language providing that the cost of domestic components exceeds 50 percent of the cost of all components, and signing the certification. The protester did not complete the second certification in its offer for the yellow dye; elsewhere in that proposal, next to a clause pertaining to transportation of supplies by sea, however, it inscribed "Raw Material Comes from [deleted]."

The contracting officer sought clarifying information from the protester regarding the foreign content of its end product under the yellow dye solicitation. The protester responded by letter as follows:

> On a cost basis our material does not meet the Buy American Act, since the crude material being purchased from [deleted] is [deleted]. . . .
>
> We thought that by processing the crude material to a more refined material & then in turn packaging the material that meets [the specification], qualifies that material as a domestic end item, regardless of the percentage of Domestic costs/expenditures.
>
> Obviously, our interpretation was wrong & we respectfully request the opportunity to correct our proposal.

Letter from Protester to Contracting Officer, Sept. 3, 2003. With regard to the green dye solicitation, the protester noted, in an e-mail response to the contracting officer's request for an extension of its offer, that its price was based on buying the crude material from [deleted], but that it might instead purchase the crude material from [deleted], which would affect its offered price.

Subsequent to these communications, the agency amended both solicitations for reasons unrelated to the subject matter of this protest and requested revised proposals. On the cover page of its revised proposal for the yellow dye, City Chemical wrote, "Purchased from a domestic mfg. Please disregard any previous correspondence." Similarly, on the cover page of its revised proposal for the green dye, the protester inscribed, "All raw materials are purchased from a domestic mfg. Please disregard previous correspondence."

Shortly after receipt of City Chemical's revised proposals, the contracting officer notified the protester that she required additional information to proceed with evaluation of its offer for the green dye. Specifically, she asked the protester to furnish a percentage breakout, by manufacturing process step, of the cost of manufacturing the dye and to identify the steps completed in the U.S.; in addition, she asked the protester to identify the percentage of the total cost of components represented by domestic components.

The protester responded that "the end product will be manufactured here in the United States (drying, grinding, blending, sifting, packing and labeling)." In addition, the protester furnished the following cost breakdown:

> Material cost [deleted]
> Manufacturing cost [deleted]

Letter from Protester to Contracting Officer, June 25, 2004.

By letter dated July 20, the contracting officer notified the protester that she considered its dye a foreign end product, subject to application of an evaluation factor in accordance with Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 225-502.[1] The contracting officer explained that the BAA provided a preference for domestic end products and that to qualify as a domestic end product, the end item had to be manufactured in the U.S., and the cost of the U.S. and qualifying country components had to exceed 50 percent of the cost of all components. The contracting officer noted that while it appeared from the protester's letter that its offer met the first prong of the test, the information furnished did not demonstrate compliance with the second prong in that more than 50 percent of the cost of materials was for materials from [deleted]. On July 27, City Chemical filed an agency-level protest taking issue with this determination.[2]

By letters dated October 5, the contracting officer informed the protester that negotiations pertaining to both solicitations were closed and that final revised proposals were requested. The letters further advised that due to the many issues raised during discussions regarding application of the BAA, the agency would perform preaward surveys to determine whether offerors' end products were

---

[1] DFARS § 225.502 provides for application of a 50-percent evaluation factor to the low foreign offer (unless the low foreign offer is exempt from application of the BAA).

[2] In the final paragraph of its protest, City Chemical observed that the contracting officer's determination addressed the green dye solicitation only, but that to the extent that the analysis could be deemed applicable to the yellow dye solicitation also, it protested that solicitation as well.

manufactured in the U.S. and whether the cost of U.S. and qualifying country components exceeded 50 percent of the cost of all components, and that the contracting officer would not make any final determinations regarding an offeror's status under the BAA until its preaward survey had been completed. In an additional letter to the protester dated October 14, the contracting officer clarified that the foregoing letters served to withdraw her previous determination regarding its BAA status.

City Chemical submitted the lowest-priced technically acceptable proposal in response to both requests. The contracting officer sought additional information from the protester to determine the BAA status of its products. With respect to the yellow dye, the protester responded that its total cost was [deleted] per pound, of which [deleted] was for raw material from [deleted] and [deleted] was for "mostly Domestic labor & other Domestic overhead costs." E-mail from Protester to Contracting Officer, Nov. 22, 2004. With respect to the green dye, the protester responded that its total cost was [deleted] per pound, of which [deleted] was for raw material from [deleted], [deleted] was for domestic material and other costs, and [deleted] was for domestic labor costs.

The contracting officer determined that in both cases, City Chemical was offering a foreign end item; as a consequence, she added a 50 percent BAA evaluation factor to its price for both dyes. Once the evaluation factor was added to City Chemical's price, Nation Ford was determined to be the lowest-priced technically acceptable offeror.

By notices dated March 16, 2005 (the yellow dye solicitation) and March 31, 2005 (the green dye solicitation), the agency notified the protester that the successful offeror under both solicitations was Nation Ford. The protester submitted timely requests for debriefing with regard to both RFPs and, following receipt of debriefing information from the agency, protested both awards to our Office.[3]

By letters dated April 11, the contracting officer notified City Chemical that she was revoking her BAA determination with regard to both solicitations and that the agency would be conducting a site visit to the protester's place of production for each dye to review the specific processes involved in its production. The contracting officer stated that based on the site visit, she would make a new determination as to the status of the protester's proposed products under the BAA. Upon receipt of the contracting officer's letters, the protester withdrew both protests.

Agency representatives conducted a site visit on April 25 and furnished the contracting officer with a written report summarizing the protester's manufacturing

[3] City Chemical protested the award under the yellow dye RFP to our Office on March 28 and the award under the green dye RFP on April 13.

process. After reviewing the information contained in the report, the contracting officer determined that her prior position that City Chemical was offering a foreign end product under both RFPs was correct. By letter dated May 4, the contracting officer notified City Chemical of the above determination and informed it that the awards to Nation Ford under both RFPs would be reinstated. On May 11, City Chemical protested to our Office.

ANALYSIS

The Buy American Act, 41 U.S.C. § 10a-10d (2000 and Supp. I 2001), provides for the acquisition of American materials and goods for public use, except to the extent that it is inconsistent with the public interest or the cost is unreasonable. If there is a domestic offer that is not the low offer, and the restrictions of the Buy American Act apply to the low offer, the contracting officer must determine the reasonableness of the cost of the domestic offer by adding an evaluation factor (of either 6 or 12 percent for civilian agency procurements, Federal Acquisition Regulation (FAR) § 25.105(a), or 50 percent for Department of Defense procurements, DFARS § 225.105) to the low offer. The price of the domestic offer is reasonable if it does not exceed the evaluated price of the low offer after addition of the evaluation factor. FAR § 25.105(c).

For manufactured end products, the FAR uses a two-part test to define a domestic end product: (1) the article must be manufactured in the United States, and (2) the cost of domestic components (i.e., components mined, produced, or manufactured in the U.S.) must exceed 50 percent of the cost of all components. FAR §§ 25.003 and 25.101; see also DFARS § 225.101. The FAR defines "component" as an article, material, or supply incorporated directly into an end product. FAR § 25.003.

The protester contends that it satisfies both prongs of the test and that its end product therefore qualifies as a domestic end product. In this regard, the protester argues that it proposes to import a raw material[4] from [deleted] and then modify it through a series of processes (which the protester does not define).[5] According to the protester, these processes yield a "processed mixture," which is the only

[4] The intervenor takes issue with the protester's references to the material that it imports as raw dye/raw material, arguing that the "raw material" is in fact a chemical compound.

[5] While the protester does not define in its protest the processes that it performs, the written report produced by the agency representatives who conducted the April 25 site visit, which City Chemical attached to its protest, does summarize them in general terms. Also, in its June 25, 2004 letter responding to the contracting officer's inquiry regarding the green dye, the protester identified its processes as drying, grinding, blending, sifting, packing, and labeling.

component of the end product. It then subjects the "processed mixture" to an "end product manufacturing process," which consists of "sifting and selecting the contract compliant material." Protest at 7.

In cases involving an end product derived from a single component or material, we have looked to whether the component/material has undergone substantial changes in physical character in determining whether manufacturing has occurred. A. Hirsh, Inc., B-237466, Feb. 28, 1990, 90-1 CPD ¶ 247 at 3; 45 Comp. Gen. 658 (1966). See also General Kinetics, Inc., Cryptek Div., B-242052.2, May 7, 1991, 91-1 CPD ¶ 445 (where we looked at whether the "essential nature" of the core component of the end product was altered in determining whether manufacturing had occurred). Further, since the BAA requires both that the end product have been manufactured in the U.S. and that the cost of components mined, produced, or manufactured in the U.S. exceed 50 percent of the cost of all components, where it is alleged that a foreign material has been manufactured into a component domestically and the component in turn manufactured into an end item domestically, we have also looked at whether the manufacturing process consists of two distinct phases, the first yielding a component that is distinguishable from the original material and the second yielding an end item that is distinguishable from the component. Davis Walker Corp., B-184672, Aug. 23, 1976, 76-2 CPD ¶ 182 at 4-6; 45 Comp. Gen. 658. Where the original material is of foreign origin and we have failed to find two distinct manufacturing phases yielding two distinct products, we have found noncompliance with the two-pronged test for defining a domestic end product. 48 Comp. Gen. 727 (1969); 46 Comp. Gen. 784 (1967).

To prevail in its protest, then, City Chemical must demonstrate not simply that it manufactures the dye, but that it manufactures the "processed mixture" from the "raw" dye, and then, in a second stage, manufactures the end product dye from the "processed mixture." In our view, we need not address the more difficult question of whether the steps that the protester performs in transforming the "raw" dye into the "processed mixture" are sufficient to constitute manufacturing because we are persuaded that the processes performed by the protester in transforming the "processed mixture" into the final product are not. In this regard, the only processes that the protester claims to perform in the second stage are sifting and selecting the "contract compliant" material.[6] We do not think that sifting to select the portion of the mixture that meets the specification's particle size standard can reasonably be regarded as manufacturing since it involves no changes--let alone substantial changes--to the physical character of the dye. Because there is no second stage manufacturing process, the raw dye from [deleted], as opposed to the "processed

[6] Presumably, although the protester does not make this argument, packaging is also part of the second stage. We have previously held that packaging should not be regarded as an additional manufacturing process so as to remove an otherwise foreign end item from the restrictions of the BAA. 46 Comp. Gen. 784.

mixture," must be regarded as the principal component of the protester's end product, meaning that the second prong of the domestic end product test is not met.

The protester further argues that even to the extent that the raw material from [deleted] may be viewed as a component of its end product, its end product still satisfies the requirement that the cost of domestic components exceed 50 percent of the cost of all components because domestic labor is also a component of its end product and its labor costs exceed the cost of the imported material. Labor is not a component of the end product within the definition set forth at FAR § 25.003, however, because it is not an article, material, or supply incorporated directly into an end product. See Consolidated Tanneries, Ltd., B-166786, June 24, 1969; see also Glazer Constr. Co., Inc. v. United States, 50 F. Supp. 2d 85, 98 (D. Mass. 1999).

The protests are denied.[7]

Anthony H. Gamboa
General Counsel

[7] Because we deny the protests, we need not address the intervenor's argument that City Chemical's proposals should be determined ineligible for award on other grounds.