

Protest of ) Date: January 11, 1991  
INTERNATIONAL BUSINESS MACHINES )  
CORPORATION )  
Solicitation No. 104230-90-A-0095 ) P.S. Protest No. 90-66

### DECISION

International Business Machines Corporation ("IBM") protests the award of a contract under Solicitation No. 104230-90-A-0095 to Vion Corporation ("Vion"). IBM claims that Vion improperly certified that the end products it would provide on the contract were domestic-source end products.

The solicitation for the acquisition of Direct Access Storage Devices ("DASD") for the Minneapolis, San Mateo, and St. Louis Postal Data Centers was issued by the Office of Procurement, Headquarters, on June 25, 1990, with an offer due date of July 25. The solicitation stated that the DASD for the Minneapolis and St. Louis sites would be purchased, while the DASD for the San Mateo location would be acquired on a 36-month Lease-to-Ownership Plan (LTOP). Award of the contract was to be made to the responsible offeror whose proposal was technically acceptable and offered the lowest price.

The solicitation also included a Buy American certificate which provided that, except as otherwise indicated by the offeror, each end product offered was a domestic end product.<sup>1/</sup> Proposals were received on July 19. Technical and cost evaluations were

<sup>1/</sup>The certificate stated as follows:

The offeror certifies that each end product, except for those listed below, is a domestic-source end product (as defined in the Preference for Domestic Supplies clause) and that components of unknown origin are considered to have been mined, produced, or manufactured outside the United States.

The certificate provided space for the offeror to identify the origin of excluded end products.

The Preference for Domestic Supplies clause referenced in the certificate defined "domestic-source end product" (in part) as "an end product manufactured in the United States the cost of whose components

performed, and the competitive range was established. Discussions were held by telephone with all offerors on August 3. Vion was questioned about its Buy American certification, which stated that although Vion's proposed 7980-3 controller was an end product of Japan, it would be manufactured in the United States as of October 1990. Vion responded by stating that it intended to deliver all products in compliance with its certification. Following discussions, best and final offers were requested to be submitted on August 14.

The contracting officer determined that based on the 60-month life cycle price, using a present value discount factor as set forth in the solicitation, IBM submitted the lowest life cycle evaluated price for a LTOP for the San Mateo Postal Data Center and Vion submitted the lowest life cycle cost for the purchase of equipment for the Minneapolis and St. Louis sites.

Upon further review of Vion's proposal and its best and final offer, the contracting officer was unable to determine the origin of the controllers that Vion intended to deliver. She contacted Vion which reassured her that Vion intended to deliver products in compliance with the Buy American certification. After receiving this confirmation, the contracting officer awarded a contract for the Minneapolis and St. Louis sites to Vion on September 20. On the following day, she awarded a contract to IBM for the San Mateo site.

According to the contracting officer's statement, both IBM and Vion were informed by telephone of their respective awards on September 20. On September 25, IBM picked up a letter informing it of the award to Vion. IBM was provided with Vion's unit prices and life cycle evaluated cost at that time. On September 28, IBM contacted the contracting officer to inquire whether the Postal Service had applied the six percent evaluation factor for foreign-source end products to Vion's proposal. IBM was informed that Vion would be supplying domestic-source end products, and as a result, the evaluation factor had not been applied.<sup>1/</sup>

On October 1, the Procurement Office received a letter from Vion dated September 28. In the letter, Vion states:

The representations that VION made in Contract #104230-90-B-4614 are correct. By way of clarification of paragraph L.10 on Page 70 of 73 in Section L

mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components." The clause explains that a "six percent proposal evaluation preference will be given to domestic source end products." Procurement Manual (PM) chapter 10, section 3, provides at 10.3.2. that proposals offering end products other than domestic source end products will be adjusted "for the purpose of evaluation by adding to the foreign proposal ... a factor of six percent of the proposal."

The Postal Service's Buy American policy is a creature of its regulations. Although it is modeled on the policy set out in the Buy American Act (41 U.S.C. ' 10a-d), that Act does not apply to the Postal Service as a matter of law.

<sup>2/</sup>IBM asserts that it was first advised that the six percent evaluation penalty had not been applied on September 25, and that this fact was verified on September 28 at the insistence of IBM counsel.

of the "Offer and Award Form and Solicitation" binder, the DASD devices are manufactured in Norman, Oklahoma and have been for over two years. The Storage Control Units are also manufactured in Norman, Oklahoma. VION invites you to visit the Hitachi plant in Norman, Oklahoma in order to observe the manufacturing process.

At IBM's request, it was debriefed on October 3. According to the contracting officer's statement, IBM's primary concern at the debriefing involved the figures that were used for the evaluation of "environmentals" for Vion. The Postal Service agreed to research this issue and, if necessary, re-evaluate Vion's proposal. IBM also advised the contracting officer that it was pursuing its research on Vion's compliance with the Buy American provisions. This protest followed on October 10.

IBM contends that to the best of its knowledge and belief, Vion improperly certified that the end products it would provide on the contract are domestic-source end products, causing the Postal Service to refrain from adding the six percent evaluation factor, to Vion's proposal. IBM maintains that if the Postal Service had applied this factor to Vion's proposal, IBM's offer would have been the lowest, entitling it to award of the contract for the Minneapolis and St. Louis sites.

IBM asserts its understanding that Vion is offering DASD machines from Hitachi Computer Products (America) Incorporated ("Hitachi"). IBM states that after analyzing each of the machines types to be delivered by Vion, it believes that each is merely assembled in the United States of components that are almost exclusively, if not entirely, of foreign manufacture.

IBM contends that the Hitachi machines offered by Vion don't meet the "50 percent component cost test" necessary to qualify them as domestic-source end products. IBM asserts that it has never witnessed or been aware of a Hitachi DASD machine which has been certified as a domestic-source end product in a competitive Postal Service procurement. Instead, IBM has observed that Vion, a marketer of Hitachi products, has usually requested the Postal Service to waive the Buy American requirement by making a determination that they are inconsistent with the best interest of the Postal Service. In this procurement, no such waiver was sought or granted.

In her report to this office, the contracting officer states that IBM's protest should be denied on several grounds. First, she asserts that IBM's protest is untimely. The protest would be untimely if it was received "later than ten working days after the information on which [it is] based is known or should have been known." PM 4.5.4 d. Measuring from the date IBM was advised of the award to Vion, September 20, the contracting officer contends that the protest, received October 10, 13 working days later, is untimely.

Second, the contracting officer alleges that IBM is not an interested party with respect to award of the contract for the Minneapolis site. The contracting officer notes that if Vion had not received award of the Minneapolis contract, award would have been made to Amdahl, which submitted the second most advantageous offer.

Third, the contracting officer contends that whether Vion will comply with its Buy

American certification is an issue outside the protest jurisdiction of our office. The contracting officer notes that Vion executed a Buy American certificate and has orally reaffirmed to her that it will supply domestic-source end products. Given Vion's commitment to supply domestic-source end products, the contracting officer views the issue of Vion's compliance as not properly before our office in a protest proceeding.

On the merits, the contracting officer maintains that IBM's protest should be denied since IBM has failed to submit substantive evidence to support its allegation that Vion will not supply domestic-source end products. IBM submitted additional comments in response to the contracting officer's report. Concerning the contracting officer's contention that IBM's protest is untimely, IBM notes that its protest was not triggered by the award to Vion, but on its belief that Vion's Buy American certification required the application of Buy American evaluation factors. IBM argues that it did not become aware of the fact that evaluation penalties had not been applied to Vion's proposal until September 25, when the contracting officer informed an IBM marketing representative of this fact. Since September 25 was within 10 working days of October 10, IBM contends that its protest is timely.

As to the issue of standing raised by the contracting officer, IBM admits that it has no information to contest the fact that it was third-in-line to receive award for the Minneapolis site. However, IBM argues that the lack of standing is of no consequence because the Postal Service's failure to add the appropriate surcharges has prejudiced the entire procurement. IBM asserts that it is an interested party with respect to the contract for the Minneapolis site, even if it is third-in-line, because a potential for rebidding exists because an unlevel playing field for bidding was created by the Postal Service; award without the application of required evaluation factors is fundamentally unfair and inconsistent with equity in government procurement; and it is possible that the Postal Service also failed to assess Buy American surcharges on the second-in-line bidder. IBM maintains that, in any event, it is an interested party with respect to the St. Louis Postal Data Center, and has standing to protest award to Vion of this site.

IBM further disagrees with the contracting officer's statement that Vion's compliance with the Buy American requirements is a matter of contract administration outside our protest jurisdiction. IBM points to two cases, Ampex Corporation, Comp. Gen. Dec. B-203021, 82-1 CPD & 163, February 24, 1982, and Bell Helicopter Textron, Comp. Gen. Dec. B-195268(1), 79-2 CPD & 431, December 21, 1979, to show that the General Accounting Office has considered Buy American compliance a proper matter for consideration. IBM states that this issue may not be crucial to the disposition of the protest at hand since, after reviewing Vion's Buy American certification, it is now apparent to IBM that Vion did not certify that its Hitachi 7980-3 controller was a domestic-source end product.

IBM notes that Vion indicated in its Buy American certificate that the 7980-3 controllers to be delivered are end products of Japan, but will be manufactured in the United States starting October 1990. IBM asserts that this certification indicated only that the controllers would be manufactured in the United States, and not that they would be domestic-source end products as defined in the certificate. According to IBM, "manufacture" is a broad term which may mean merely final assembly of component parts that come from a foreign country.

IBM claims that the Postal Service treated Vion's certification as one that contained a commitment to deliver only domestic-source end products, since it failed to add the required six percent penalty to the 7980-3 controllers. IBM argues that in taking this action, "the Postal Service ignored, in contravention of its regulations, the issue of whether equipment to be provided under the Contract contains more than 50 percent domestic components, an integral part of both the BAA certification process and the policy behind it."

IBM notes that Vion has indicated that it will provide controller end products from Hitachi's plant in Norman, Oklahoma. IBM submits an affidavit from James E. Crowley, Jr. who is an employee of IBM assigned to provide support for the St. Louis Postal Data Center. In his affidavit, Mr. Crowley states that he observed that certain equipment Vion shipped under the contract to the St. Louis Postal Data Center came from a warehouse in San Jose, California, and not from Norman, Oklahoma. IBM concludes from this that Vion is supplying equipment to the St. Louis Postal Data Center which is manufactured overseas, not in Norman Oklahoma.

The final issue IBM addresses is the contracting officer's statement that IBM did not submit sufficient evidence to support its allegation that Vion improperly certified its equipment as domestic-source end products. IBM claims that given the fact that there is virtually no form of discovery in the Postal Service protest process, it has more than met its burden with regard to sufficiency of evidence. IBM maintains that its claim was filed only after a thorough examination of Hitachi equipment, and that it has raised substantial questions of fact and law.

IBM asserts that the evidence presented by the contracting officer to support her belief that Vion properly certified its equipment are unsubstantial. IBM views Vion's assertions as conclusory and lacking comprehension of what constitutes a "domestic-source end product" under the Buy American certification.

### Discussion

We first address the timeliness of the protest. IBM states that it did not become aware of the fact that Buy American evaluation penalties had not been applied to Vion's offer until September 25, when its representative spoke to the contracting officer. IBM asserts that this fact was verified again on September 28 at the insistence of IBM counsel. Measured from either date, IBM's protest is timely.<sup>1/</sup>

IBM's standing to challenge the award for the Minneapolis Postal Data Center is irrelevant. Since, as the contracting officer acknowledges, IBM was next in line award for the St. Louis site, it has standing to raise its challenge to the award to Vion.

<sup>3/</sup>Contrary to the contracting officer's view, IBM's notice that a contract had been awarded to Vion did not advise it whether appropriate Buy American evaluation factors had been applied to Vion's offer. IBM promptly pursued its inquiries in that regard, and filed its protest in a timely fashion once the information was obtained.

We conclude that we have jurisdiction over IBM's protest. While we agree with the contracting officer that a contractor's compliance with a Buy American certificate is a matter of contract administration outside our jurisdiction, it is within our jurisdiction to consider whether the evaluation factors called for by the Postal Service's Buy American policy have been correctly applied. Here, IBM's contention is that Vion's offer was incorrectly evaluated for Buy American purposes. This is a matter within our jurisdiction to review.<sup>1/</sup>

In its Buy American certificate, Vion indicated that although its proposed 7980-3 controller was an end product of Japan, it would be manufactured in the United States as of October 1990. Contrary to IBM's contention, Vion's certification does not unequivocally suggest that the 7980-3 controllers Vion offered would not be domestic-source end products. However, the matter did not rest with Vion's certification. After best and final offers were received, the contracting officer contacted Vion for clarification as to what Vion intended to deliver. Vion reassured the contracting officer that it intended to deliver products in accordance with its certification. The contracting officer reasonably understood this to mean that Vion would be providing domestic-source end products.<sup>1/</sup> Based on that understanding, the contracting officer concluded that the six percent evaluation factor should not be added to Vion's proposal.

The determination that the Buy American certification did not require the addition of the six percent evaluation factor is part of the contracting officer's affirmative determination of Vion's responsibility. Dura Electric Fluorescent Starter Division, Comp. Gen. Dec. B-225323, 87-1 CPD & 234, March 2, 1987. Our office reviews affirmative responsibility determinations only in limited circumstances, including when there are allegations of fraud, bad faith, or a failure to apply definitive criteria set forth in the solicitation. Sensory Electronics, Inc., P.S. Protest No. 87-124, January 21, 1988; Lightron of Cornwall, Inc., P.S. Protest No. 84-6, February 27, 1984; EDI Corporation, P.S. Protest No. 83-51, January 26, 1984. IBM has failed even to allege the existence of any of these, and in the absence thereof, the contracting officer's determination must be upheld.<sup>1/</sup>

<sup>4/</sup>The GAO has held that an agency should not automatically rely on certifications of compliance with the Buy American Act when it has reason to question whether a domestic product will be furnished. Hewlett-Packard Co., Comp. Gen. Dec. B-228271, 87-2 CPD & 545, December 3, 1987; Autospin, Inc., Comp. Gen. Dec. B-233778, 89-1 CPD & 197, February, 23, 1989; See Designware, Inc., Comp. Gen. Dec. B-221423, 86-1 CPD & 181, February 20, 1986.

<sup>5/</sup>IBM questions whether the contracting officer or representatives of Vion are aware that the 50 percent domestic components requirement even exists. From the record it does not appear that the contracting officer discussed that requirement with Vion specifically. The omission is insignificant. The certification put Vion on notice of the requirements inherent in its undertaking to supply domestic-source end products, defining that term by cross-reference to the Preference for Domestic Supplies clause. It was the offeror's responsibility to review and understand the nature of its undertaking to supply domestic-source end products.

<sup>6/</sup>In the two cases IBM cites, Ampex Corporation and Bell Helicopter Textron, *supra*, the GAO found it appropriate to consider whether the contracting agency properly evaluated the awardee's proposal where prior to award the awardee had furnished information to the contracting agency bearing upon whether the offered product was domestic. As discussed above, in this case the contracting officer did not rely on the certification alone, but sought further clarification of it from Vion. Under these circumstances, we find

The Postal Service's acceptance of Vion's offer obligates Vion to comply with its BAA certification. Whether Vion in fact complies with this obligation is a matter of contract administration, which we will not review. Tulsa Diamond Manufacturing Corp., General Aero Products Corp., and Unidynamics/National Vendors, P.S. Protest Nos. 85-18, 85-20 and 85-23, June 20, 1985; Bryant Organization, Inc., Comp. Gen. Dec. B-228204.2, 88-1 CPD & 10, January 7, 1988; Dura Electric Fluorescent Starter Division, *supra*; Despatch Industries, Inc. Comp. Gen. Dec. B-225063, 86-2 CPD & 524, November 5, 1986.<sup>17</sup>

IBM asserts that this protest should not be treated as a mere matter of contract administration because of additional information it has learned since the filing of the protest. IBM presents new evidence, in the form of an affidavit, stating that certain equipment which Vion shipped under the contract to the St. Louis site came from a warehouse in San Jose, and not from Norman, Oklahoma. IBM claims that this evidence indicates that Vion ordered units manufactured overseas, not in Norman, Oklahoma, and thus is not complying with its certification. Whatever the weight this information deserves,<sup>17</sup> it provides nothing to suggest that the matter is appropriate for our review in view of our existing standards. Tulsa Diamond Manufacturing Corp., General Aero Products Corp., and Unidynamics/National Vendors, *supra*.

Finally, IBM alleges that it has put forth sufficient evidence to support its claim that Vion improperly certified its equipment as domestic-source end products. IBM claims that its protest was filed only after a thorough examination of Hitachi equipment and that it has continued to raise in good faith substantial questions of fact and law. "A protester, however, has the burden of proving its case." Bender Shipbuilding & Repair Co., Inc., B-219629.2, 85-2 CPD & 462, October 25, 1985. Although IBM has raised questions concerning Vion's compliance with its Buy American certification, it has not met its burden of proof.

that the contracting officer acted reasonably in not applying the six percent evaluation factor to Vion's offer.

<sup>17</sup>IBM claims that the two latter cases, which were cited by the contracting officer, are *inapposite*. IBM claims that both the Dura and Despatch case, unlike the case before us, involved a situation where the protester certified that it would supply only domestic end products. IBM views Vion's certification as equivocal in that regard. As discussed above, we disagree. The contracting officer understood the certification to require Vion to furnish domestic-source end products, and proceeded on that basis. Dura and Despatch thus are relevant to our inquiry.

<sup>18</sup>Affidavits are treated as merely persuasive, rather than conclusive, evidence of the matters contained therein. See, e.g., International Mailing Systems, On Reconsideration, P.S. Protest No. 84-13, July 2, 1984; Carini's Inc., P.S. Protest No. 83-65, December 13, 1983. IBM's affidavit is of little evidentiary value in any case, since it establishes only that the controllers are being shipped from a warehouse in San Jose, California, and not that they are coming from overseas.

The protest is denied.

**[DD Anna for:]**

William J. Jones  
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Office of Contracts and Property Law

**[checked against original JLS 6/24/93]**