

Protest of) Date: February 22, 1991
INTERNATIONAL BUSINESS MACHINES)
CORPORATION)
Solicitation No. 104230-90-A-0095) P.S. Protest No. 90-66

ON RECONSIDERATION

International Business Machines Corporation ("IBM") has timely requested reconsideration of our January 11, 1991 decision denying its protest against award to Vion Corporation ("Vion") for Direct Access Storage Devices.

The basis for the protest was a contention by IBM that Vion had improperly certified in its offer that the end products it would provide were domestic-source end products, thereby causing the Postal Service to refrain from adding a six percent evaluation factor to Vion's proposal. IBM maintained that the 7980-3 controllers Vion was supplying were not domestic-source end products, but were merely assembled in the United States of components that were almost exclusively, if not entirely, of foreign manufacture. IBM further alleged that Vion's compliance with its Buy American certificate is a matter within our jurisdiction to review.

In our decision, we found that we had jurisdiction over IBM's protest. We considered whether the evaluation factors called for by the Postal Service's Buy American policy had been correctly applied and, after analyzing the facts and relevant legal precedent, concluded that the contracting officer had acted reasonably in not applying the six percent evaluation factor to Vion's offer. We noted that the Postal Service's acceptance of Vion's offer obligates Vion to comply with its Buy American certification. We held, however, that whether Vion in fact complies with this obligation is a matter of contract administration, which we will not review.

Procurement Manual ("PM") 4.5.7 n. states that a request for reconsideration "must contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not considered." Information not previously considered refers to that which "a party believes may have been overlooked by our office or to information which a party did not have access to during the pendency of the original protest." Spaw-Glass Construction, Inc., On Reconsideration, P.S. Protest No. 87-46, September 18, 1987; Fort Lincoln New Town Corporation, On Reconsideration, P.S. Protest No. 83-53, November 21, 1983.

In its request for reconsideration, IBM continues to maintain that the question of whether an awardee will comply with its Buy American certification is not a question of contract administration, but one of contract formation within the scope of our bid protest jurisdiction. IBM brings to our attention a decision by the General Services Administration Board of Contract Appeals^{1/} which was issued while IBM's protest was being considered.^{1/} IBM asserts that our protest decision is incorrect as a matter of law since it fails to apply the rule of Rocky Mountain Trading.

In Rocky Mountain Trading, the protestor claimed that certain products offered by the awardee were not domestic end products, and that the Department of the Interior, United States Geological Survey, should have made a twelve percent adjustment to the awardee's proposal. The Department of the Interior moved to dismiss for lack of jurisdiction, arguing that when a contracting officer reasonably relies on an awardee's Buy American certification, ultimate compliance by that awardee with its certification is a matter of contract administration, beyond the reach of the Board.

The Board concluded that it had jurisdiction over the protest. It further held that "[t]he evaluation impact of the Buy American Act provisions is a matter of contract formation; whether or not [the awardee] actually proposed a domestic end product directly affects the correctness of the evaluation and selection determination." Rocky Mountain Trading, 1990 GSBCA Lexis 744, *2.

IBM maintains that the holding set forth in Rocky Mountain Trading "now appears to be the governing law in the forum in which the large majority of automated data processing protests are conducted," and that this holding should therefore be applied to IBM's protest. IBM also asserts that, unlike the decisions of the General Accounting Office which view ultimate compliance with the BAA as a matter of contract administration, the holding of the Board in Rocky Mountain Trading promotes fairness in the procurement process and effectively implements the domestic preference goals of the BAA.

IBM's argument suggests that the United States Postal Service is required to follow decisions rendered by the General Services Administration Board of Contract Appeals ("GSBCA"). While we have, in appropriate cases, considered principles of law expounded in decisions rendered by the General Accounting Office ("GAO"), neither the GSBCA nor the GAO has jurisdiction over the Postal Service. Telex Federal Telephony, Inc., P.S. Protest No. 87-104, November 17, 1987. "The GSBCA receives its limited grant of bid protest jurisdiction pursuant to the Competition in Contracts Act of 1984, P.L. 98-369, a statute which by its terms does not apply to the Postal Service." Id.; see also American Telephone Distributors, Inc., P.S. Protest No. 87-117, February 23, 1988.^{1/} In light of the significant procedural and jurisdictional differences that exist

^{1/}Rocky Mountain Trading Co.--Systems Division GSBCA No. 10894-P (December 14, 1990) (1990 GSBCA LEXIS 744).

^{2/}IBM offers no explanation why it did not bring the decision to our attention in a more timely manner.

^{3/}Another significant difference between the GSBCA and the Postal Service is that the GSBCA has broader authority to order discovery than our office does. The Board has the authority to grant discovery requests "to the extent necessary to assure that the record before it contains the relevant and pertinent

between the GSBCA and our office, we are not persuaded by IBM's argument that the holding in Rocky Mountain Trading must be applied to this protest.

IBM further disagrees with the conclusion reached by this office concerning the reasonableness of the contracting officer's actions. IBM asserts that the contracting officer's interpretation of Vion's responses to queries regarding its Buy American certificate was not reasonable, since Vion never affirmatively stated or otherwise represented that the products it actually intended to deliver were domestic end products.

IBM's argument that the contracting officer acted unreasonably in failing to apply the six percent evaluation factor to Vion's proposal was already considered and rejected in the original decision. "Reconsideration is not appropriate where the pro- tester simply wishes us to draw from the argument and facts considered in the original decision conclusions different from those we reached in that decision." Tompkins & Associates, On Reconsideration, P.S. Protest No. 88-58, January 27, 1989; Fort Lincoln New Town Corporation, On Reconsideration, supra.

Finally, IBM contends that the protest decision was incorrect because relevant precedent and concerns for integrity in government procurement mandate that the Postal Service conduct a meaningful investigation into this matter. In support of this contention, IBM cites to J.I. Case Company, Comp. Gen. Dec. B-221588, B-221588.2, 86-1 CPD & 430, May 5, 1986, in which the GAO directed the agency to verify whether the end products manufactured by the awardee actually qualified for waiver of the BAA provisions under the "participating country" exception. Although the GAO may have the authority to order an investigation, this office lacks such authority. "The function of this office is the limited one of resolving bid protests based upon written reports provided by protesters and contracting officers." Southern California Copico, Inc., P.S. Protest No. 83-76, March 5, 1984; International Mailing Systems, P.S. Protest No. 84-13, April 27, 1984. We thus decline to order an independent investigation of this matter.

IBM has not presented any factual or legal grounds warranting reversal or modification of our original decision. Therefore, on reconsideration, we adhere to our decision denying the protest.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law **[checked against original**

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facts necessary to properly decide the issues raised." Rocky Mountain Trading, 1990 GSBCA Lexis 744, *14. Our bid protest forum, on the other hand, is less suited to resolving factual disputes, as we cannot conduct adversary proceedings to any significant extent. Cohlma Airline, Inc., P.S. Protest No. 87-118, April 13, 1988.