

Government Accountability Office Sustains Protest Where Awardee Failed to Comply with the Trade Agreements Act

Summary: In *Wyse Technology, Inc.*, B-297454, January 24, 2006, the Government Accountability Office (“GAO”) sustained a protest by an unsuccessful bidder who argued that the awardee failed to certify that the product to be provided would comply with the Trade Agreements Act (“TAA”) (19 U.S.C. §§ 2501-81 (2000)). *Wyse* serves as a reminder that contractors’ competitors are pursuing compliance even where procuring agencies are not. Additionally, the GAO will function as a congressional watchdog, in both its audit and bid protest functions, to ensure compliance with the TAA.

Background: The Trade Agreement Act (“TAA”), 19 U.S.C. § 2501 *et seq.*, waives the Buy American Act (“BAA”) preference for domestic end products in government acquisitions at or over a certain dollar threshold with respect to end products from signatory countries to the World Trade Organization Government Procurement Agreement (“WTO GPA”) and other free trade agreements. Where the TAA applies, it also bars the purchase of products from nondesignated countries.

In *Wyse*, the GAO ruled that the government’s award of a contract to CDW Government, Inc. (CDW-G) violated the TAA despite the fact that CDW-G’s proposal was to supply the computer hardware model specifically identified in the “brand name or equal” solicitation.

- The government solicitation specified Hewlett Packard HP Compaq t5520 Thin Client devices or their equivalent.
- The GAO’s decision unequivocally states that “[a]mong the certifications incorporated and required by this solicitation was the Trade Agreements Certificate.” However, the on-line version of the solicitation as it appears at <http://www.fbo.gov/spg/DOJ/FPI-UNICOR/MMB/CG0270-05/Attachments.html> did not appear to specifically reference the TAA or clause FAR 52.225-5, Trade Agreements. It did require “certification that offerors representations and certifications have been entered at the ORCA website.” It also incorporated FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, but in the online solicitation, did include the full text of the clause. Thus, the online solicitation did not specify which of the provisions in paragraph (b) applied. FAR 52.225-5, Trade Agreements, falls under the clauses under paragraph (b) that only apply if checked.
- CDW-G proposed supplying the identified t5520 devices, but specifically did not certify compliance with the TAA. Wyse Technology offered its own product, the Wyse V30, and certified compliance with the TAA. The terms of the solicitation were not protested.
- CDW-G was awarded the contract on a best-value basis – it’s proposal being \$3252.25 less expensive than Wyse’s \$525,714.25 proposal. Via a written debriefing letter dated October 5, 2005, Wyse learned that CDW-G had proposed the t5520. On October 11th, Wyse contacted

Hewlett Packard and learned that the t5520 was manufactured in Taiwan and, as such, would not comply with the TAA. Wyse informed the government of this problem at a meeting on October 12th, but the government's response was that Wyse should have protested this issue prior to the submission of proposals. Wyse filed a protest at the GAO on October 17th. The government did not stay performance and the contract was fully performed.

Analysis: In its protest, Wyse argued that the award was in violation of the TAA and that CDW-Gs failure to certify compliance with the TAA should have caused the government to make inquiries about the acceptability of the t5520 before it awarded the contract to CDW-G. The government argued that Wyse's protest was untimely as Wyse's arguments relate to a solicitation impropriety that should have been raised prior to the time set for the receipt of proposals.

- The GAO dismissed the government's timeliness argument by citing to earlier decisions that held that "with regard to protests of awards based on the brand name under brand-name-or-equal solicitations...protests that the brand name would not otherwise satisfy solicitation requirements were timely, even though filed after award." The GAO also found that the failure to certify TAA compliance for the acquisition did not come to Wyse's attention until the October 12th meeting. The protest, filed on October 17th, was thus timely.
- The GAO sustained the protest on the grounds that CDW-G failed to certify compliance with the TAA and the government failed to ensure this compliance. This resulted in the delivery of non-compliant items to the government. In addition, the GAO believed that Wyse had a right to assume the government would ensure compliance with the solicitation requirements regarding TAA compliance. "Award may not be based upon a proposal, where, as here, the offeror declines to certify compliance, as required, with a material term of the solicitation, in this case the TAA, such that the proposal consequently fails to establish a legal obligation to comply with that material term."
- Because the contract had been fully performed, the GAO awarded Wyse its proposal costs and its costs in pursuing the protest, including attorney's fees. In addition, the GAO stated it would bring to the attention of the General Services Administration (GSA) the fact that a number of other vendors were offering the t5520 on the GSA Advantage Web site.

Practitioners' Tips:

- Contractors must maintain their own vigilance and cannot rely on the government agencies to specify compliant items because the adverse consequences of noncompliance are severe. Contractors' competitors, for example, are increasingly using legal action to enforce compliance under the TAA. In this instance, the mechanism was through the GAO bid protest process. In addition, an inaccurate certification with regard to whether an offered product is compliant may amount to a false statement. In the office products context, competitors have instituted actions under the qui tam provisions of the civil False Claims Act and obtained settlements for violation of the TAA totaling approximately \$22 million.
- To assure compliance whether you are a prime contractor competing on a government contract or a subcontractor, pay attention to requirements that might be incorporated by reference in a catchall clause, such as FAR 52.212-5, or through requirements such as online certifications. Where a clause such as FAR 52.212-5 offers a laundry list, and the list is not attached to the online solicitation, inquire to understand which clauses apply.

- This case also illustrates the complexity of understanding the interplay between the BAA and the TAA. Information technology ("IT") such as the Hewlett Packard HP Compaq t5520 Thin Client devices at issue are exempt from the BAA pursuant to FAR 25.103(e) but are not exempt from the TAA. Although the TAA itself was implemented in part to function as an exemption to the BAA, once the TAA applies, it prohibits purchases from nondesignated countries and there is no exemption for IT from the TAA.
- In recent years, the GAO and Congress have increased their focus on compliance with the TAA and other domestic preference statutes, including the Berry Amendment, which requires the Department of Defense to purchase certain food, clothing, and specialty metal items only from domestic sources.

For further information please contact:

Rebecca E. Pearson at (202) 344-8183 – repearson@venable.com,

W. Patrick Doherty at (202) 344-8229 – wpdoherty@venable.com

or any of the other attorneys in Venable's Government Contracts Practice Group

www.venable.com ~ 1-888-VENABLE

*The **Government Contracts Update** is published by the Government Contracts Practice Group of Venable LLP. Venable publications are not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations. © Copyright by Venable LLP 2006.*