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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540**

FILE: B-189730

DATE: March 8, 1978

MATTER OF: Westinghouse Electric Corporation

DIGEST:

1. Where agency awards contracts to several contractors to perform initial phase of research project and then essentially conducts cost and technical competition to decide which of them will be selected to continue project, GAO will review agency's refusal to select particular contractor. Rule that GAO will not review protest of agency's refusal to exercise a contract option is not applicable.
2. Where agency awards follow-on phase of research project based on reduced scope of work, protester, whose technical proposal was evaluated based on full scope of work, was not prejudiced since protester's proposal was rejected only because its proposed costs were considered too high even after cost reductions for reduced scope of work were applied.
3. Protester was not misled by agency when its proposal for follow-on phase of project was rejected because of high costs, because protester should have been aware that cost would be a factor in the agency's evaluation, even though agency failed to reveal its importance relative to the technical factors.
4. Agency was not required to negotiate with protester so that it might propose lower costs where revamping of protester's technical proposal would have been required in order to make its costs acceptable.

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5. While protester was not misled as to evaluation factors for award of follow-on phase of competitive parallel procurement, GAO suggests that agency issue RFP prior to selection of contractors for each succeeding phase.

By letter dated July 27, 1977, Westinghouse Electric Corporation (Westinghouse) protests the selection by the Energy Research and Development Administration, now Department of Energy (DOE), of General Electric Company (GE) and Curtiss-Wright Corporation (CW) to proceed with Phase 2 under existing contracts for DOE's ongoing high temperature turbine technology (HTTT) program. CW, as an interested party, has filed comments on the protest.

As background, on June 25, 1975, DOE issued request for proposals (RFP) E (49-18)-1806 for the research, design and development of a HTTT program. Under the program, DOE seeks "to advance, in a six year period, the technology of a high temperature (multi-stage) power turbine subsystem to a technology readiness condition, i.e., to a point where minimal risks would be involved for an agency or manufacturer in developing the turbine subsystem for use in a full-scale, open-cycle gas turbine system." As a result of the competition, on May 28, 1976, DOE awarded separate contracts to Westinghouse, GE, CW and United Technologies, Inc. (UTI), in the respective amounts of \$2.8, \$3.1, \$1.5 and \$2.1 million.

Under Phase 1 (Program and Systems Definition) of the contracts, the contractors were to submit proposals for revised scopes of work for Phase 2 (Technology Testing and Support Studies) and Phase 3 (Technology Readiness Verification Test Program). These revised scopes of work and continuation proposals were the deliverables under Phase 1 of the contracts. Selection of the contractors for Phase 2 was to be made from among the contractors participating in Phase 1.

With regard to the Phase 2 contractor selection and evaluation process, the contracts state, in pertinent part, as follows:

"ARTICLE VI - EVALUATION OF PHASE 1 PERFORMANCE

"DETERMINATION TO PROCEED TO PHASE 2

"Prior to completion of Phase 1 a determination must be made whether to proceed with Phase 2. This determination will be influenced by but not be limited to the following:

"1. The technical feasibility of the Overall Plant Design Descriptions for both fuels, the reference and backup turbine subsystem design, the proposed Phase 2 and Phase 3 programs, and the combustor designs for burning low Btu gas.

"2. The contractor's plan to implement what he has gained from the HTTT program indicating the percentage of gas turbine subsystems to be manufactured by the contractor. (Note: The most desirable plans will be those containing a higher percentage of contractor manufacturing capability.)"

(Article VI further advised that the agency would utilize an advisory panel to assist in the technical evaluation.)

Westinghouse, as well as the other Phase 1 contractors, submitted Phase 2 cost and technical proposals. DOE's Source Evaluation Board (SEB) reported the following technical and implementation ratings of the Phase 2 proposals.

<u>Offeror</u>	<u>Technical</u>	<u>Implementation</u>
GE	777	outstanding
Westinghouse	667	outstanding
CW	502	poor
UTI	474	poor

The results of DOE's advisory panel evaluation were:

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<u>Offeror</u>	<u>Score</u>
GE	850
Westinghouse	755
CW	715
UTI	672

The evaluated costs proposed by the contractors in escalated millions of dollars for Phase 2 were as follows:

<u>Offeror</u>	<u>Evaluated Phase 2 Costs in Millions of Dollars</u>
GE	\$24.6
Westinghouse	\$72.2
CW	\$31.0
UTI	\$23.0

By letter dated July 19, 1977, DOE advised Westinghouse that it was not selected for continuation into Phase 2. The selection document explained the Phase 2 award selection as follows:

"Selection Decision

"Based upon the evaluation of the Technical Panel and the Board as well as my own consideration, I [the Deputy Assistant Administrator for Fossil Energy] have concluded that General Electric and Curtiss Wright have presented technologies which should be further explored and developed in Phase 2 of their respective contracts.

"General Electric received the highest rating in the evaluation of the Technical Panel and the Board. Their approach to water cooled turbine blade appears promising and has been well executed, to date. Furthermore, the G.E. proposed estimated cost for Phase 2 appears reasonable and is next to lowest of the four contractors.

"Curtiss-Wright, although it was ranked third in the overall evaluation by the Board and the Technical Panel, has a decidedly different technical approach from that of G.E. It appears worthy of continued effort. This technology of blade cooling by air provides a contrast from the water cooling approach being pursued by G.E. and the water and air cooling approach being pursued by United Technologies.

"Westinghouse, despite the fact that it received the second highest evaluation and has a very good program in my judgment, has presented a very expensive plan. Its proposed costs are far above those of the other three contractors and are not justifiable in view of the technological approach of air cooling, which is similarly being attempted by Curtiss-Wright. Hence, I direct that we proceed to Phase 2 in the Curtiss-Wright contract."

As indicated above, Westinghouse protested to this Office on July 27, 1977. DOE awarded GE and CW Phase 2 contracts on July 29, 1977, notwithstanding the protest, on the basis that delay would be costly, disrupt the inter-relationship between the HTTT program and other DOE programs and impair the staff team assignments of contractor personnel.

At the outset, we must consider DOE's and CW's contention that our Office should not consider the protest on its merits. As indicated above, the HTTT program contracts were applicable to all Phase 2 offerors. The contracts provided:

"In the event that the Government fails to exercise its unilateral right to require the Contractor to proceed with the next succeeding phase, the Contractor is not

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authorized to expend any additional funds in excess of the amount obligated and set forth separately for each Phase." (Emphasis added.)

The contracts also provided in general terms a statement of work inclusive of all three phases of development. Thus, DOE and CW maintain that by accepting the terms of the contract Westinghouse granted to the Government an option exercisable at the sole discretion of the Government. Citing our decisions C. G. Ashe Enterprises, 56 Comp. Gen. 397 (1977), 77-1 CPD 166, and Inter-Alloys Corporation, B-182890, February 4, 1975, 75-1 CPD 79, they argue the protest pertains to contract administration which is a function and responsibility of the contracting agency and that under our Bid Protest Procedures (4 C.F.R. Part 20 (1977)) we should not consider contentions that the agency should have exercised a contract option provision which is purely for the interest and benefit of the Government.

As the decisions cited above state, we will not review a protest by a contractor challenging a contracting agency's determination to fulfill its needs through competition in lieu of exercising a contract option, because such a determination is a matter solely within the agency's discretion. Industrial Maintenance Services, Inc., B-189958, September 15, 1977, 77-2 CPD 195. Here, however, while Westinghouse is protesting because DOE did not exercise its Phase 2 option, the agency did not solicit offers for Phase 2, but instead exercised options of other Phase 1 contractors to perform Phase 2. Essentially, Westinghouse is challenging the validity of that selection process.

We think it reasonably clear from DOE's conduct in this matter, at every stage, that it was essentially conducting a competitive procurement for Phase 2. In the first place, DOE conducted a competitive evaluation of the proposals submitted under Phase 1. It used a source evaluation board and designated a source selection official. Criteria for source selection were stated and proposals ranked on a competitive

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basis. The source selection document itself refers to another "competition" for Phase 3. Phases 2 and 3 were unpriced under the contracts, and throughout the record of the protest, DOE refers to the "award" of the Phase 2 contracts. Thus, we do not believe that the decisions cited above are applicable in this situation, and therefore we will consider Westinghouse's protest.

Westinghouse contends that it lost the competition primarily because of an evaluation factor which was not disclosed to it until after the selection process was completed. It concludes from the record that its submissions were highly regarded from a technical standpoint and that the reason for its not being considered for negotiation of Phase 2 was its cost. It believes that the "agency's program budget was, in fact, driving the program" and that "cost was, in fact, the deciding factor in the source selection."

At no time, however, Westinghouse states, "did the agency suggest that it was willing to take more risks than it had originally intended or that it had budget constraints." Rather, Westinghouse feels the agency encouraged Westinghouse to expand its program under Phase 1 and incur more cost.

In addition, Westinghouse states that no attempt was made by the agency evaluators to evaluate or give a technical rating based on the work actually to be performed by the Phase 2 contractors. As an example, it states that the proposals were evaluated on the basis of inclusion of full scale engines but the contracts negotiated with GE and CW call for subsize or subscale activity, full scale activity having been effectively eliminated. Westinghouse believes that its technical rating would improve relative to GE if the evaluations were made on the actual contracted subsize/subscale activity.

Accordingly, Westinghouse states that our Office should direct the agency to do what Westinghouse asserts the agency should have done at the outset--"to enter promptly into meaningful contract discussions with Westinghouse." At the conclusion of these negotiations, Westinghouse believes that the agency then would be in a position to determine whether Westinghouse's proposal is superior to CW's.

DOE, in turn, points out that Westinghouse was advised well before the Phase 2 selections were made that DOE did not plan to issue a Phase 2 RFP but would make the selections based on the Phase 1 submissions. DOE explains that the Phase 2 selection process was not conducted as a traditional competition, but rather as part of an ongoing research and development program, the ground rules for which were set forth in the Phase 1 RFP.

Further, DOE states that agency and Westinghouse representatives closely coordinated during Phase 1 and that, as a result of this continual coordination, the agency technical personnel were thoroughly familiar with Westinghouse's Phase 2 approach and associated costs, which were deliverables under the Phase 1 contract.

DOE also believes that as a result of this coordination, Westinghouse was or should have been aware of the agency's concern with the cost element in the Phase 2 selection process prior to the submission of its revised Phase 2 statement of work. In this regard, DOE has submitted an affidavit from its HTTT project manager stating that he advised the Westinghouse HTTT project manager, in December 1976, that "Westinghouse's estimate of their Phase 2 costs, which appeared in the Phase 1 proposal, was high by a factor of two."

We note that the Westinghouse project manager admits that this statement was made to him, but states that at other times thereafter, other responsible agency representatives told him that Westinghouse's function was to perform well in Phase 1 and that it was the agency's responsibility to obtain the necessary funding to accomplish the objectives of the program.

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DOE contends that, in any event, the importance of cost was evident from the Phase 1 RFP, which listed cost as an evaluation factor and required offerors to submit cost proposals for the entire program in competing for the Phase 1 awards. To DOE, it is clear that offerors could reasonably assume that cost would continue to be important in the Phase 2 selection. Moreover, DOE observes that Westinghouse is an experienced Government contractor and therefore is familiar with the GAO decisions and Federal Procurement Regulations (FPR) provisions indicating that cost is always a factor to be considered in awarding a contract. It cites FPR 1-3.805 and our decision 51 Comp. Gen. 153 (1971) (as well as others) in support. It concedes, however, that "it would have been desirable not only to more clearly state this in the original RFP but also to indicate the relative importance of cost to the technical evaluation factors therein." DOE states that corrective steps will be taken in subsequent competitive parallel contracts, as well as in the Phase 3 selection, to insure technical compliance with these requirements.

DOE also disputes Westinghouse's assertion that the goals of the HTTT program have been reduced. The goal of the program, DOE states, is to develop high temperature turbine subsystem technology to a "Technology Readiness" status for burning coal in coal-derived fuels in a utility application. It states that in Phase 1, all contractors utilized a conceptual design of their commercial gas turbine in their tasks. When submitting the Phase 2 proposals, DOE states, some contractors included the cost of detailed design of the commercial turbine and some did not, and therefore an allowance was made for this in the evaluation of proposals. However, when contracts for Phase 2 were negotiated, detailed commercial turbine design efforts were deleted from the scope of the work "because of DOE's conviction that the HTTT Program is technology oriented" and that "final commercial turbine design goes beyond the scope of the program."

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DOE notes that 3 of the 4 contractors estimated Phase 2 cost at about \$20 - 30 million, while Westinghouse proposed a \$72 million program. DOE states that it is not prepared to say that the higher cost program represented a lesser goal. It does say, however, that:

"* * * the path chosen by Westinghouse required more effort and, therefore, cost more to reach the HTTT goal. The proposals of the successful contractors represent their best estimate of the effort and cost necessary to reach the goal. They may be lower than Westinghouse because of a different starting point or other unique advantage. In DOE's judgment, their proposals are nevertheless responsive to DOE's goal of achieving technology readiness of a high temperature turbine subsystem."

As Westinghouse states, it appears that the GE and Westinghouse technical submissions were scored by the SEB based on the inclusion of full scale engines. We cannot say that the technical ratings of these proposals would have remained exactly the same if they had been rescored based on the reduced scope of work. However, we think it is clear from the record that the award selection would not have changed.

GE proposed a water cooled turbine while Westinghouse proposed an air cooled turbine. The SEB considered it desirable to carry both concepts into Phase 2, and GE, the top ranked firm, received a Phase 2 award based on its water cooled concept. Of the remaining Phase 1 contractors, Westinghouse's technical proposal was scored highest. However its proposed cost was also the highest of the three by a considerable amount. Consequently, even though Westinghouse's technical proposal was highly regarded, award was ultimately made to CW, since CW also proposed the air-cooled approach, its proposed costs were deemed reasonable, and DOE considered it to be a capable contractor. Thus, while the proposals were not rescored when full scale engine development was dropped, Westinghouse was eliminated from Phase 2 because its costs were too high and not because its technical proposal received a lower score than GE's based on full scale engine development. Therefore, we can see no prejudice to Westinghouse because the technical proposals were not rescored.

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As to the cost factor, Westinghouse notes that it was selected for Phase 1 award notwithstanding its high cost. It argues that because of this and because the agency encouraged Westinghouse during Phase 1 to undertake added tasks (it cites a deposition/corrosion/erosion test as an example), it was led to believe that its cost approach was justified. It contends that it was thereby misled by the agency, and cites Virgin Islands Business Associates, Inc., B-186846, February 16, 1977, 77-1 CPD 114, and Iroquois Research Institute, 55 Comp. Gen. 787 (1976), 76-1 CPD 123, to support its position.

So far as the record shows, Westinghouse was selected for Phase 1 award not because the agency considered its total program costs to be acceptable, but because Westinghouse was considered to be a capable source and the agency was interested in that firm's approach to the HTTT program. In fact, each of the 4 offerors responding to the RFP was awarded Phase 1 contracts based on estimated costs that were relatively low in comparison to the estimated costs of the follow-on phases. In the circumstances, we do not think that an offeror receiving a Phase 1 award reasonably could assume that the agency considered its program costs for the remaining phases to be acceptable.

Moreover, it is clear from the record that Westinghouse was aware during Phase 1 that budgetary restraints could reduce the scope of the HTTT program. While Westinghouse states that the agency would not reveal the amount of funds that were available for the program, and that its project manager was given conflicting advice by the agency as to the importance of reducing costs, the fact that Westinghouse on several occasions asked agency officials about funding limitations indicates that Westinghouse was aware that funding could be a problem. Therefore, we can see no reason for Westinghouse to assume that cost would not be an important consideration to DOE.

In the two cases cited by Westinghouse, we admonished contracting agencies for failing to advise offerors of the relative importance of cost to the technical factors. DOE concedes that it would have been desirable to have stated the importance of cost relative to the technical factors. However, as DOE asserts, Westinghouse should have been aware prior to the Phase 2 selection that cost could be a factor in the award selection process.

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Indeed, cost cannot be ignored by an agency in any contractor selection process. Grey Advertising, Inc., 55 Comp. Gen. 1113 (1976), 76-1 CPD 225; Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168. Therefore, Westinghouse may not complain because its high cost approach was a matter of great concern to the agency.

We agree that generally the procuring agency should define the scope of work and level of risk as clearly as possible. In this case, however, DOE set objectives in a developing area leaving to the ingenuity of the offerors the approach to be followed in achieving those objectives. Precise definitions of the work scope or risk level would have tended to restrict the very industrial ingenuity which DOE sought to exploit.

Westinghouse was aware that the agency placed maximum reliance on the Phase 1 contractors to propose the plan they believed would best meet the program goal of technology readiness. In fact, the Phase 1 RFP made it plain that:

"The Program will place maximum reliance on the Contractor(s) for systems and program definition. Only general objectives are given in this RFP in order that maximum use can be made of extensive contractor experience in planning and implementing similar gas turbine technology programs for commercial applications * * * (Emphasis added.)

Nevertheless, we think it is important that interested parties have an equal opportunity to compete. DOE equalized here by independently assessing probable costs and by eliminating from proposals, including Westinghouse's, those aspects not to be utilized in Phase 2. Obviously, the acceptability of risk and its extent must be assessed in evaluation. DOE concluded here that any greater risks which might have been inherent in the successful proposals were acceptable relative to the higher costs involved in materially reducing the risk. Whether the DOE judgment will prove sound cannot be determined at this time; however, it appears to have a rational basis. Given the circumstances, we cannot find the procurement deficient for indefiniteness or lack of opportunity to compete on an equal basis.

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Westinghouse insists, however, its proposal could be reduced by \$27 million. In support, it has submitted an alternate HTTT program to this Office which it states will meet the objectives of the program at a cost competitive with the costs proposed by the successful contractors.

Thus, Westinghouse maintains that the agency should have conducted meaningful negotiations with it concerning the reduced scope of work. It cites a provision of its Phase 1 contract stating that:

"The contractor and the contracting officer shall promptly enter into good faith negotiations to establish the revised estimated costs and Statement of Work for the performance of the following phase."

The statement in Westinghouse's Phase 1 contract that the parties shall enter into "good faith" negotiations prior to the following phase, appears in Article III of the contract, entitled "Statement of Work and Determination of Estimated Costs." Article III required the Phase 1 contractor to provide a statement of work and revised cost estimate for the following phase and, in that context, provided for good faith negotiations between the parties to establish the revised estimated costs and statement of work for the following phase. Article VI, as quoted above, listed the factors to be considered prior to a determination to proceed with Phase 2. There is no statement in Article IV to the effect that negotiations would be conducted with each Phase 1 contractor prior to Phase 2 selection.

DOE states however that the evaluators did give serious consideration to the question of whether discussions with Westinghouse would be fruitful in lowering the cost of Westinghouse's proposal to an acceptable level. According to DOE, it was decided that such discussions would not be fruitful because the proposal could only be reduced by \$9.35 million short of a complete revamping of Westinghouse's technical approach.

In DOE's view, the absence of negotiations between the agency and Westinghouse was consistent with ordinary principles of fairness and equality of treatment in exercising a contract option, was consistent with agency procedures applicable to research and development contracting; or, analogizing to ordinary procurement rules, was consistent with FPR 1-3.805, in that Westinghouse's proposal was out of the competitive range because of its high price. DOE cites its Interim SEB Handbook, dated December 5, 1975, applicable to research and development contract selections and in effect during the Phase 2 selection process, as cautioning against advising offerors of the relative strengths or weaknesses of their proposals in relation to those of other proposers.

This Handbook states that discussions should be used by the agency evaluators to clear up ambiguities or lack of substantiation in a proposal, but should not be used to point out inherent weaknesses in the offeror's approach. DOE states that meaningful discussions of the cost weaknesses in Westinghouse's proposal "would have necessarily entailed discussion of those technical areas [which] could have been modified to lower the proposed cost." Citing a number of our decisions, including 51 Comp. Gen. 621 (1972), DOE believes that such discussions "would have created a real possibility of technical transfusion and technical leveling, an eventuality of which GAO has clearly disapproved." Finally, DOE cites FPR 1-3.805 and our decisions, including RKFM Products Corporation, B-186426, September 15, 1976, 76-2 CPD 247, as stating that discussions need be held only with those offerors within the competitive range, that price is properly a consideration in determining the competitive range, and that an offeror eliminated from the competitive range on the basis of price carries the burden of proving that such elimination resulted from an abuse of agency discretion. DOE concludes that Westinghouse has not carried that burden of proof in this case.

We agree with DOE. Westinghouse acknowledges that in order to reduce its costs to an acceptable level it must select other technical approaches. In our view, neither our prior decisions nor the quoted provision of the Westinghouse Phase 1 contract required the agency to negotiate with Westinghouse in order to permit it to offer other approaches. The negotiation process should not be used to re-write an offeror's proposal or to engage in technical leveling and technical transfusion. The negotiation process is not designed for that purpose. Raytheon Company, 54 Comp. Gen. 171 (1974), 74-2 CPD 137; 51 Comp. Gen. 621, supra.

Finally, we recognize that a portion of Westinghouse's protest consists of specific criticism of the CW and GE proposals based on the limited material made available by DOE to the protester. Westinghouse contends that the GE approach to blade cooling has certain shortcomings which were not fully considered by the agency evaluators. Additionally, the protester believes that the GE Phase 3 plan is impractical because its test vehicle would require more fuel than is presently projected to be available and because of certain blade design problems that have to be solved.

As for CW, Westinghouse believes that its technical approach is inadequate (for example, its wire-mesh approach to transpiration cooling), and that, as stated above, this contractor is not capable of successfully performing the program. Westinghouse also contends that much of the work to be conducted by CW in its Phase 2 program has already been demonstrated by Westinghouse's subcontractor, Detroit Diesel Allison, under Government contract. Westinghouse argues that it could achieve the same level of technology readiness at a lesser cost, and furthermore, that CW is not qualified as a manufacturer of heavy turbines.

With respect to GE's approach to blade cooling, it is DOE's view that Westinghouse's objections to air cooling are speculative and that the Phase 2 investigation to be undertaken by GE will settle some of the questions raised. As for fuel availability, DOE anticipates that adequate fuel supplies will be available. Also, DOE points out that while GE would have to investigate certain blade design problems during Phase 3, Westinghouse, under its different approach, would have to deal with still other problems. As to CW, DOE disagrees with Westinghouse's technical criticisms and has found CW to be a capable contractor.

We do not consider it appropriate to resolve these differences between Westinghouse and DOE. Suffice it to say that the issues in dispute involve highly technical matters and, as the parties recognize, it is not our function to independently evaluate the technical adequacy of proposals. Decision Sciences Corporation, B-182558, March 24, 1975, 75-1 CPD 175. As DOE points out, this Office will not question an agency's technical evaluation unless it is clear from the record that there was not a reasonable basis for the evaluation. Tractor Jitco, Inc., 55 Comp. Gen. 499 (1975), 75-2 CPD 344. Based on the record, we cannot say that agency's technical evaluation was unreasonable.

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Accordingly, the protest is denied.

However, with respect to these competitive parallel procurements, we note that DOE states that in conducting the Phase 3 selection it will advise the competitors of the relative importance of cost to the other evaluations factors. We agree that Phase 3 competitors should be advised of the relative importance of cost. While it is not clear how DOE plans to disclose these evaluation criteria, we think, and are suggesting to the Secretary of Energy, that competition would be enhanced in these procurements if the agency issued an RFP prior to each of the succeeding phases. While, in this case, we do not believe that the competitors for Phase 2 selection were misled as to the selection factors, we also believe that the possibility of the competitors being misled would be diminished, and more effective competition would result, with the implementation of our suggestion.

R. F. Kistner
Deputy Comptroller General
of the United States