

Mr. Fitzmaurice
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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-202208

DATE: August 14, 1981

MATTER OF: North Coast Electric Company

DIGEST:

1. GAO will not decide question whether protester was misled by IFB regarding application of Buy American Act price differential to foreign qualifying country (Canadian) end product offered for civil works procurement. Protester admits that it would have offered same product regardless of alleged IFB defect and claims only that it was justified in carelessly certifying origin (Canadian, instead of United States) of its end product because of alleged defect. However, protester had duty to carefully certify origin of end product regardless of alleged defect.
2. Claim of mistake alleged after bid opening but prior to award in Buy American Act certification may not be allowed since correction would displace lower bid and mistake is not evident from claimant's bid. See DAR § 2-406.3(a)(3) (1976 ed.).
3. Protester acted at its own risk when, upon allegedly receiving conflicting advice regarding application of Buy American Act differential to Canadian end products, it accepted erroneous interpretation and bid on basis that price differential did not apply.

North Coast Electric Company (North Coast) protests the award of a contract to any other bidder under invitation for bids (IFB) No. DACW67-81-B-0012 issued by the Seattle District, United States Army Corps of Engineers (Army).

[Protest Against Army Corps of Engineers Contract Award]

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The IFB, which was for "civil work," solicited bids for two 230-kv. transformers for the Libby Powerhouse, Libby, Montana. North Coast argues that the Buy American Act's 6-percent price differential should not have been added to its bid which certified that the transformers to be furnished were of Canadian origin. On this point, North Coast argues that the IFB exempted Canadian end products from the price differential and that, in any event, the procuring office misled it in a prebid conversation about the application of the price differential. In the alternative, North Coast argues that it made a mistake in its Buy American Act certification and that its items are actually of domestic origin.

Based on our review of the record and our analysis of the issues, we deny the protest.

When bids were opened, McGraw-Edison Company was the apparent low bidder. However, the Army later rejected McGraw-Edison's bid as nonresponsive. The next low bid was North Coast's at \$1,994,813; but since North Coast was offering a product manufactured in Canada, the contracting officer determined that the Buy American Act, 41 U.S.C. §§ 10a-d (1976), required the application of a 6-percent price differential to the North Coast bid. This was done since even Canadian end products are subject to the differential if the procurement, as here, involves a civil work. See Defense Acquisition Regulation (DAR) § 6-104.4(f) (DAC #76-25, October 31, 1980); See also DAR § 6-103.5(d), Canadian Supplies, (1976 ed.) as published at 32 C.F.R. § 6-103.5(d) (1979). This raised North Coast's total evaluated price to \$2,114,501.78, well above the \$2,014,972 bid of the General Electric Company, the firm currently in line for the award.

In its protest, North Coast argues that the 6-percent price differential should not have been applied in this situation. First, it notes that when it tried to get guidance from the Army procurement office regarding the application of the Buy American Act to a Canadian end product, a procurement agent, allegedly, was uncertain and only indicated that she thought the act applied. To get a second opinion,

North Coast contacted a representative of the Defense Contract Administration Service who allegedly stated that a Canadian end product would definitely be exempt from the 6-percent price differential. Accepting this advice, North Coast states that it made no effort to identify the United States components included in the Canadian end product. And, in IFB section "K," paragraph 6(b), North Coast certified that "not more than" 94 percent of the cost of all components directly incorporated into the end product related to components which were of foreign (Canadian) origin. According to North Coast, it chose the 94-percent figure merely because it reflects the price to be paid to the Canadian supplier--in other words, it does not reflect the actual cost percentage of foreign-made components incorporated into the end product. North Coast now maintains that more than 50 percent of the cost of the end product's components relate to components which are United States-made. And North Coast argues that the end product which it would actually furnish is of United States origin and is, therefore, exempt from this differential.

North Coast argues that the IFB never made it clear that a Canadian end product would be subject to the price differential; moreover, to the contrary, the company points out that the IFB indicates that "qualifying country [Canada, for example] end products" would not be subject to the differential. Further, North Coast notes that the solicitation contains no provision which specifically states that this procurement involves a civil work. Thus, North Coast believes that in addition to being left confused by the information it received from the Army procurement agent, the IFB gave North Coast the reasonable impression that Canadian end products would not be subject to the price differential.

Although the IFB does not contain an express statement that it is for a civil work and does suggest that "qualifying country" end products will not be subject to the Buy American price differential, the IFB does contain the standard "Buy American-Balance of Payments Program Certificate (Oct. 1980)" clause. Paragraph (c) of this clause states that "offers will

be evaluated in accordance with the policies and procedures of [DAR] Section VI." Specifically, DAR § 6-103.5(d), above, provided, in effect, that the price differential would apply to "Canadian supplies" in civil works procurements. Moreover, we think a knowledgeable bidder would have recognized the nature of the procurement since the use of the letters "DACW" in the IFB designation denoted "Department of the Army-Civil Work" and there was no indication in the IFB that the work was connected with a military use.

In any event, we need not decide the question whether North Coast was misled by the IFB. Here, the protester does not argue that it would have offered another end product had it known that Canadian end products were subject to the price differential. Rather, it argues that it would have offered the same product but under a domestic, rather than a Canadian, certification. Essentially, therefore, as noted above, the protester argues that it was justified in making a careless certification as to whether its end product was of Canadian or United States origin because of the wording of the IFB. However, we do not agree that the protester was justified in making a careless certification even if the IFB was misleading as argued. In our view, the protester had a duty to carefully certify the origin of its end products. Therefore, we reject this argument.

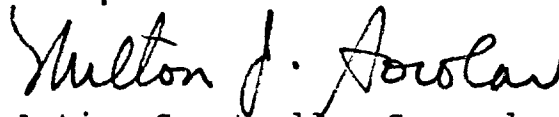
Moreover, a claim of mistake alleged after bid opening but prior to award may be allowed--if correction would result in displacing a lower bid--only if the "existence of the mistake and the bid actually intended are ascertainable substantially for the invitation and the bid itself." DAR § 2-406.3(a)(3) (1976 ed.). Nothing in North Coast's bid contains the slightest indication that its offer of other than domestic end products was erroneous. Thus, the regulatory test for allowing correction is not met here.

We are also mindful that North Coast alleges that it obtained an opinion from the Defense Contract Administration Service which advised that the price differential did not apply. North Coast alleges that

it was misled by two different opinions it received on this point. However, when North Coast chose to accept the advice of the Defense Contract Administration Service, it did so at its own risk. Therefore, the conflicting advice North Coast received is not a basis to sustain its protest.

Protest denied.

Nevertheless, since the standard Buy American Act clause, above, does not now contain an express statement that the price differential will be added to bids offering qualifying country end products for civil works, we are recommending to the Defense Acquisition Regulatory Council that the clause be changed to incorporate this statement. We are also recommending to the Secretary of the Army that civil works procurements be identified in the future by means of an express statement in the pertinent solicitation.



Acting Comptroller General
of the United States



COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON D.C. 20548

B-202208

August 14, 1981

The Honorable John O. Marsh
The Secretary of the Army

Dear Mr. Secretary:

Enclosed is a copy of our decision of today denying the protest of North Coast Electric Company under Corps of Engineers procurement DACW67-81-B-0012. This protest was the subject of a report (DAEN-CCM) dated April 3, 1981, from the Chief Counsel of the Corps.

Although we denied the protest, we recommend that civil works procurements be identified in the future by means of an express statement in the pertinent solicitation.

Please inform us as to the action taken.

Sincerely yours,

A handwritten signature in cursive script that reads "Milton J. Aroslan".

Acting Comptroller General
of the United States

Enclosure



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-202208

August 14, 1981

Mr. James T. Brannan, Director
Defense Acquisition Regulatory
Council

Dear Mr. Brannan:

Enclosed is a copy of our decision of today in the matter of North Coast Electric Company.

We recommend that the standard Buy American Act clause, discussed in our decision, be changed to incorporate an express statement that the price differential will be added to bids offering qualifying country end products in civil works procurements.

We would appreciate being informed as to the action taken on our recommendation.

Sincerely yours,

A handwritten signature in cursive script that reads "Milton J. Fowler".

Acting Comptroller General
of the United States

Enclosure