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*Review*

**DECISION**



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

FILE: B-202407

DATE: October 27, 1981

MATTER OF: Concrete Technology, Inc.

**DIGEST:**

1. Protest that procuring agency should have applied Buy American Act differential relating to supply rather than construction contract, where IFB made clear that procuring agency considered solicitation to be for construction, is untimely under 4 C.F.R. § 20.2(b)(1) (1981) since not filed prior to bid opening.
2. Buy American Act does not absolutely prohibit procurement of foreign materials, but establishes preference for domestic material by requiring that differential be added to price bid on material of foreign origin.

Concrete Technology, Inc. (CTI), protests the District of Columbia Government's (District) award of a contract to Beer Precast Concrete Limited (Beer) to manufacture and install precast concrete panels for the Washington Civic Center under invitation for bids (IFB) No. 0289-AA-02-0-0-CC. The protester essentially contends that the District failed to apply the small business and labor surplus area differential required by the Buy American Act, 41 U.S.C. §§ 10a-d (1976), in evaluating Beer's bid and that a proper bid evaluation would result in award to CTI.

We find the protest to be without merit.

Beer, a Canadian firm, was the low bidder at \$2,077,000. CTI's bid of \$2,265,569 (9 percent higher than Beer) was second low. CTI's initial protest to the District was denied after hearings and review by the District Contract Review Committee. CTI's protest, on the same grounds, was filed with our Office on the day award was made to Beer.

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The protester claims that the District should have added a 12-percent differential to Beer's total bid price because CTI, the low domestic bidder, is a small business concern which would manufacture the panels in a labor surplus area. CTI asserts that this evaluation preference is required by Executive Order No. 10582, December 17, 1954, and by Federal Procurement Regulations (FPR) § 1-6.104-4(b) (1964 ed. circ. 1), notwithstanding that the IFB and the District's procurement procedures for construction contracts do not require this differential and that the FPR prescribes it only for supply and service contracts. The protester insists that the contract is primarily to supply precast concrete panels and that bids should be analyzed according to the District's regulations for supply contracts. CTI argues, in the alternative, that if the construction contract rules do apply, Beer's bid was ineligible for award because the firm will furnish Canadian construction materials contrary to IFB requirement for domestic material and the bid did not list any nondomestic construction materials.

Contrary to CTI's characterization, the District contends that the IFB requirement that the contractor both manufacture and install the panels on the steel structure of the Civic Center according to IFB drawings constitutes "construction" within the meaning of the agency's procurement procedures. District of Columbia Materiel Management Manual (DCMMM) §§ 2642.1(B)(4) and 2642.6(B)(1) (1974 ed.). The District argues that it was not, as CTI suggests, simply buying panels to be delivered to the construction site.

We find the initial contention raised by CTI, namely, whether the IFB should be considered a construction or supply procurement, to be untimely raised. The IFB contained many documents which made clear that the District considered this procurement to be for a construction contract. The bid form, bid bond form, Instructions to Bidders, General Provisions and Labor Provisions were all titled "Construction" or "Construction Contract." Therefore, this basis of CTI's protest was apparent from a review of the IFB and should have been protested prior to bid opening under section 20.2(b)(1) of our Bid Protest Procedures (4 C.F.R. part 21 (1981)). However, the allegation concerning the application of the act to the instant bids is timely and will be considered.

The District notes that, although Executive Order No. 10582 provides a basis for giving additional preference to small business and labor surplus area concerns under the act, the authority to do so is discretionary and has never been implemented for construction contracts by either the Federal Government or the D.C. Government. While FPR § 1-6.104-4(b) does require the use of a 12-percent differential for small business and/or labor surplus area concerns, it applies only to supply and service contracts. The FPR requires a 6-percent differential be added to the cost of all nondomestic construction material for construction contract bids. FPR § 1-18.603-1 (1964 ed. amend 48). Like the FPR, the D.C. Government procurement procedures contain separate Buy American provisions for supply and service and construction contracts; the regulation for construction contracts also provides for the addition of a 6-percent differential to the cost of all nondomestic construction material offered in the bid. DCMMM § 2642.6(E)(2)(b) (1974 ed.).

The District's contract review committee found that Beer was offering nondomestic construction material because the panels would be manufactured in the firm's Canadian plant. The committee nevertheless concluded that the D.C. Government could properly award the contract to Beer because the act and implementing agency regulations allow award to a nondomestic bidder if domestic bids are unreasonably priced. DCMMM § 2642.6(D) (1974 ed.). The cost of domestic construction material is deemed unreasonable if the cost of the low domestic bid is greater than the cost of the foreign bid plus a 6-percent differential. DCMMM § 2642.6(D)(1)(a) and (b) (1974 ed.).

Although the IFB did not require bidders to submit cost data for foreign construction material offered, the committee concluded that this deficiency did not affect the bid evaluation. Applying the 6-percent differential either to the cost of Beer construction material or to the entire bid price would not change the relative standing of the parties--Beer remains the low bidder in either case. The committee contends that there is no basis in the act or implementing regulations to apply the differential to the entire bid price. Allis-Chalmers Corporation, B-195311, December 7, 1979, 79-2 CPD 397.

Contrary to CTI's assertions, the differential applies only to the cost of the construction materials delivered to the construction site and the installation costs should not be included in the Buy American Act computations. Allis-Chalmers Corporation v. Friedkin, 481 F. Supp. 1256, 1258 (M.D.Pa. 1980); 41 Comp. Gen. 70 (1961).

We have noted, however, that a contracting agency should not fail to request bidders to submit bids with the material cost data requisite to the agency's determination as to whether to forego the specified construction material or to provide a domestic substitute. United States Steel Corporation, supra. The fact that the IFB failed to require that bidders furnish this data with their bids obviously resulted in the District's quandary about the portion of the bid price to be included in the Buy American computations and hampered the cost reasonableness determination. In addition, this solicitation deficiency is contrary to the requirements of the agency's procurement procedures. DCMMM § 2642.6(E)(2) (1974 ed.). Because the contract review committee has already called this deficiency to the attention of the District's contracting personnel, we find it unnecessary to make a further recommendation.

Concerning CTI's contention that, under the terms of the IFB, nondomestic materials could not be offered, we note the Buy American Act requires that only domestic construction materials be used for the construction, alteration, or repair of public buildings or public works unless the head of the agency concerned determines that the requirement is impractical, inconsistent with the public interest, or unreasonable as to cost. 41 U.S.C. §§ 10b and 10d (1976). The act does not absolutely prohibit the procurement of foreign materials. Rather, it establishes a preference for domestic material by requiring that a differential be added to the price bid on any material of foreign origin. Air Plastics, Inc., B-199307, August 22, 1980, 80-2 CPD 141.

Therefore, the District's decision that the domestic bids were unreasonable as to cost amounts to a determination to waive application of the Buy American Act because the use of domestic rather than foreign precast concrete panels would increase the project

price by more than 6 percent. We have held that this action is consistent with the act, which permits use of foreign materials when it is determined that the cost of domestic material is unreasonable, and is not subject to our legal objection. United States Steel Corporation, B-194403, February 11, 1980, 80-1 CPD 118.

The protest is denied.

A handwritten signature in cursive script, reading "Shelton J. Fowler".

Acting Comptroller General  
of the United States