



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: SMIT Transformatoren B.V.

File: B-222440

Date: July 28, 1986

DIGEST

1. Tennessee Valley Authority (TVA) is subject to the bid protest jurisdiction of the General Accounting Office under the Competition in Contracting Act of 1984 (CICA) since TVA comes within the statutory definition of a federal agency subject to CICA.
2. For purpose of applying a statutorily-prescribed differential in the evaluation of bids offering foreign-manufactured "extra high voltage power equipment," Tennessee Valley Authority erred in adopting a definition of that term recited in the statement of the conference managers accompanying the conference committee report on the legislation where the managers' statement indicates they intended to repeat the definition used by the Department of Commerce but erroneously understood it.

DECISION

SMIT Transformatoren B.V. (SMIT) protests invitation for bids (IFB) No. HA-458028 issued by the Tennessee Valley Authority (TVA) for the procurement of power transformers and certain other accompanying equipment, with an option for an additional procurement of the same type and quantity of items. SMIT protests TVA's cancellation of the IFB initially issued for this procurement and the inclusion of a Buy American differential in the IFB readvertising the subject procurement. We sustain the protest.

On December 13, 1985, TVA issued the IFB for two 161-kV (kilovolts) main power transformers with the option to purchase certain additional units. SMIT states that it was the low responsive bidder at the time of bid opening on February 4, 1986. On February 21, 1986, TVA issued a notice of its rejection of all bids and cancellation of the solicitation. The notice stated that the requirement would be:

". . . readvertised using a 25-percent Buy American differential provided by section 506 of Public Law 99-141 in lieu of the differentials provided in this invitation to bid."

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The solicitation was reissued on March 12, 1986, with a bid opening scheduled for April 2, 1986. As reissued, the solicitation contained the following clause:

"ADDITIONAL EVALUATION FACTOR AFFECTING FOREIGN EHV POWER EQUIPMENT

"Public Law No. 99-141 requires that TVA award any contract for EHV [extra high voltage] power equipment to a domestic manufacturer if TVA determines that such domestic EHV power equipment meets TVA's technical requirements at a price not exceeding 125 percent of the bid or offering price of the most competitive bidder. In addition to any other evaluation factor specified in this invitation, the following evaluation factor applies to bids of bidders offering foreign-manufactured extra high voltage (EHV) power equipment.

"a. If domestic and foreign manufacturers of EHA power equipment meet TVA's technical requirements, then, for evaluation purposes only, the bid price of foreign bidders will be increased by 25 percent (adjusted foreign evaluation price).

"b. As provided in Conference Report No. 99-307 o[f] Public Law 99-141, this provision applies to transformers rated above 10,000 kVA; . . . "

SMIT timely protested the solicitation as reissued, stating that as a result of the inclusion of this requirement in the solicitation an additional 25-percent evaluation factor--more than double the foreign product differential in the solicitation as initially issued--is added to its bid and it is no longer the low bidder. The protester maintains that TVA's inclusion of the differential required by Public Law 99-141 in the solicitation was improper because the Buy American provision does not apply with respect to the transformers and other equipment here being procured, which SMIT contends is not EHV equipment. The protester thus maintains that the solicitation should be reinstated as it was initially issued and that the contract should be awarded to SMIT as the low, responsive bidder.

In response to SMIT's protest, TVA initially challenges our jurisdiction to decide this protest under the authority of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551, et seq. (Supp. II 1984).

In previous post-CICA decisions, we have considered and rejected TVA's challenges to our jurisdiction under CICA to decide bid protests of its procurement activities. In those cases, we concluded that since, under the provisions of 31 U.S.C. § 3551(3), our bid protest authority

extends to "federal agencies" as that term is defined in the section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 472 (1982)), and TVA, as a wholly owned government corporation, is a federal agency within that definition, it is subject to our bid protest jurisdiction. Monarch Water Systems, Inc., 64 Comp. Gen. 756 (1985), 85-2 C.P.D. ¶ 146; Newport News Industrial Corp.; Simulation Associates, Inc., B-220364, Dec. 23, 1985, 85-2 C.P.D. ¶ 705.

The statutory provision which is the subject of this protest is section 506 of Pub. L. No. 99-141, 99 Stat. 579 (1985), the Appropriations Act for energy and water development for fiscal year 1986, which states:

"No funds appropriated in this Act may be used to pay the salary of the Administrator of a Power Marketing Administration or the Board of Directors of the Tennessee Valley Authority unless they award contracts for the procurement of extra high voltage power equipment manufactured in the United States when such agency determines that there are one or more domestic manufacturers offering a product which meets the technical requirements of such agency at a price not exceeding 125 per centum of the bid or offering price of the most competitive foreign bidder. . . . This section shall not apply to any procurement initiated before its effective date or to the acquisition of spare parts."

The term "extra high voltage power equipment" is not defined in the statute or in the report of the House Committee on Appropriations on H.R. 2959 (H.R. Rep. No. 99-195, 99th Cong., 1st Sess. (1985)) or in the report on the bill by the Senate Committee on Appropriations (S. Rep. No. 99-110, 99th Cong., 1st Sess. (1985)). The term is discussed in the statement of the conference managers accompanying the conference committee report on H.R. 2959, which states, in relevant part:

"Language has been included regarding the procurement of extra high voltage (EHV) power equipment by . . . the Tennessee Valley Authority. As defined by the Department of Commerce, the EHV power equipment industry includes, but is not limited to, transformers rated above 10,000 kVA"1/ (Emphasis added.) H.R. Rep. No. 99-307, 99th Cong., 1st Sess. 63 (1985).

SMIT contends that TVA should not have included this increased Buy American differential in a solicitation for 161 kilovolt main power transformers on the grounds that the definition recited in the conference report is inconsistent with industry standards which define EHV power equipment as having a minimum voltage of 242 kilovolts and that it has

1/ The parties do not dispute that the 161-kV transformers here being purchased are rated above 10,000 kVA; they do disagree as to whether this is the proper definition of EHV power equipment to be applied.

been informed by the Commerce Department that the conference committee mistakenly used statistical information provided by the Commerce Department to arrive at an erroneous definition of EHV power equipment and, therefore, that the definition accompanying the conference report is incorrect. The protester further notes that the conference report definition is inconsistent with the following statement concerning section 506 made by the chairman of the Senate Committee on Appropriations during the Senate's consideration of the conference report:

". . . the conference managers included as report language what they believed was a Commerce Department definition for EHV power equipment in order to clarify the scope of equipment to be covered by this amendment. The Department of Commerce now indicates that this is not its definition of EHV power equipment. To eliminate potential confusion, I believe it is prudent to limit the scope of the amendment to the type of EHV power equipment referred to in House Report 99-195. Based on the House report and the American National Standards Institute definition of EHV [extra high voltage] power equipment is alternating current [AC] and direct current [DC] electrical equipment rated and operating above 242 kilovolts and less than 1,000 kilovolts." 131 Cong. Rec. 13448 (daily ed. Oct. 17, 1985) (statement of Senator Hatfield).^{2/}

In its initial protest, SMIT contended that the definition of EHV power equipment applied by TVA to this procurement is contrary to the accepted understanding of the industry, as evidenced by the fact that the three leading trade groups in the field--the American National Standards Institute (ANSI), the Institute of Electrical and Electronics Engineers (IEEE), and the National Electrical Manufacturers Association--all adopt a minimum voltage of 242 kV, above that of the equipment purchased here. In addition, the protester asserted that it had been informed by the Department of Commerce employee who provided the statistical information to the conference committee that the conference mistakenly used that information to arrive at an erroneous definition of EHV power equipment; that (as indicated by Senator Hatfield's statement) the Department of Commerce in fact employs the ANSI definition which encompasses equipment having a rating greater than 242 kV; and that the Senate conferees were notified of the error appearing in the statement of the conference committee managers accompanying the conference report.

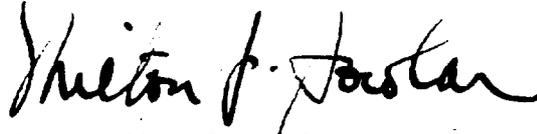
None of this was addressed, much less disputed, in TVA's report submitted to our Office in response to the protest. Rather, TVA defends its position solely on the basis of the definition contained in the conference managers' statement which, it maintains, as a matter of statutory construction must take precedence over the statement of the Senate committee chairman made on the floor of one House.

^{2/} Senator Johnson concurred in Senator Hatfield's comments.

We understand the argument TVA has made but think its approach is too narrow. The purpose of the statute was to protect domestic industry by prescribing the application of a price differential in the evaluation of bids offering foreign "extra high voltage power equipment," a term the drafters evidently thought did not require definition within the statute itself. A definition does appear in the conference managers' statement accompanying the conference committee report but, as we read that statement, the conference managers did not attempt to define what the conferees meant by EHV power equipment but to recite their understanding of that term "[a]s defined by the Department of Commerce."

The protester asserts that the conference managers misunderstood statistical information provided to them by the Department of Commerce and as a result erroneously recited a definition which was at odds with that accepted in the industry and employed by the Department of Commerce itself. We have no reason to believe that the conference managers set out to do any more than to convey a correct, established, definition of EHV equipment. In the absence of any rebuttal by TVA of the protester's assertion that the equipment here being purchased falls below the industry's definition of EHV power equipment, a position corroborated by the IEEE Standard Dictionary of Electrical and Electronics Terms (Second Edition), we do not think the conference managers' erroneous perception should be controlling.

We therefore sustain the protest. It follows that TVA's cancellation of the original solicitation and readvertisement under a more stringent evaluation criterion was in error. The second solicitation should be canceled and the first reinstated and award made consistent with its terms on the basis of the bids received as of February 4, 1986.^{3/}

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^{3/} TVA apparently disagrees with SMIT as to whether that firm is the low bidder on both lots of equipment under the original solicitation. No final determination of the awardee, or awardees, was made in view of the subsequent cancellation of that solicitation and the present record, therefore, is not sufficiently complete for us to resolve the issue.