

DECISION



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

FILE: B-194530

DATE: September 25, 1979

MATTER OF: Westinghouse Electric Corporation

CNG 00216

DIGEST:

[Protest Alleging Entitlement]

1. Protester is not entitled to 12-percent differential in evaluation of bid with ~~foreign firm~~ under Buy American Act because protester does not meet either solicitation or current regulatory requirements concerning labor surplus area concerns. While solicitation clause did not reflect regulatory change, protester would not be prejudiced by award thereunder since it does not qualify under either standard.
2. Enforcement of Antidumping Act is responsibility of Secretary of Treasury and International Trade Commission, not GAO.

AGC 00076

Westinghouse Electric Corporation (Westinghouse) has protested the evaluation of the bids submitted in response to solicitation No. DS-7364 issued by the Bureau of Reclamation, Department of the Interior.

The solicitation is for the removal and replacement of 16 power transformers at the Shasta Powerplant, Central Valley Project, California. Westinghouse submitted a bid price of \$4,207,626 and, following application of various stated evaluation factors, an evaluated bid price of \$8,324,746.

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Hitachi America, Ltd. (Hitachi), bid \$4,727,149, evaluated at \$8,188,887.24. The evaluation factors included an evaluation for efficiency, an amount for Government inspection in a foreign country, and addition of a 6-percent differential for foreign offers.

Interior proposes to award the contract to Hitachi as the firm which submitted the low evaluated bid.

Westinghouse's protest is based on the allegation that, under the terms of the solicitation, it was entitled to have a 12-percent differential added to the foreign offer of Hitachi, which would make Westinghouse's bid low, rather than the 6-percent differential applied.

The portion of the solicitation pertinent to the protest is paragraph 1.2.3.b., which reads as follows:

"b. For foreign offers only, the following additional factors will be used for the purpose of comparison of offers:

(1) When the materials are determined to be of foreign origin, 6 percent of the offered price for the materials delivered at the destination, including applicable spare parts, if any, will be added. The cost of installation work at the jobsite will not be included in the computation of any Buy American differential prescribed by the Federal Procurement Regulations.

(2) An additional differential of 6 percent of the offered price for the materials delivered at the destination, making a total of 12 percent, will be added when the lowest responsive offeror offering domestic materials meets one or both

of the following requirements: (a) Is a small business concern, as defined in 41 CFR 1-1.701.1, or (b) Warrants that he will perform, or cause to be performed by first-tier subcontractors, more than 25 percent of the contract price in or near sections of concentrated unemployment or underemployment as a certified-eligible concern, or more than 50 percent of the contract price in a persistent labor surplus area or a substantial labor surplus area, all as determined by the Secretary of Labor."

In its bid, Westinghouse indicated that 100 percent of the manufacturing cost would be performed in its Sharon, Pennsylvania, plant, which is 14 miles from Youngstown, Ohio, a labor surplus area. On March 12, 12, 1979, 4 days after bid opening, Westinghouse furnished the contracting officer with information to show that through its subcontractors and suppliers, 34.8 percent of its bid price would be expended in or near areas of concentrated unemployment. Westinghouse argues that based on the above, it or its first-tier subcontractors will be performing more than 25 percent of the contract price in or near sections of concentrated unemployment or underemployment.

Interior responds to the above by stating it had failed to modify its solicitation clauses to take into effect recent regulatory changes effective June 14, 1978. These changes, published in volume 43 of the Federal Register at page 26009 and now incorporated at 41 CFR subpart 1-1.8, included new definitions and deleted the portion of the prior regulations dealing with "certified-eligible concerns."

Interior argues that the failure to make the required changes in paragraph 1.2.3.b. should have

been obvious to Westinghouse because of the inconsistencies with paragraph 1.2.9, "Labor Surplus Area Subcontracting Program" and the new clause 22 of standard Form 32, "Utililization of Labor Surplus Area Concerns."

We agree with Westinghouse that these clauses do not require an inconsistent reading as the latter two deal with subcontracting procedures of the con-tractor whereas paragraph 1.2.3.b. concerns the evaluation of bids from bidders.

The recent regulatory change referred to by Interior is 41 CFR § 1-6.104-4(b) (1979), dealing with the evaluation of bids when the Buy American Act (41 U.S.C. § 10a-10d) is involved. This section reads, in pertinent part:

"(b) Except as provided in paragraph (d) of this section, bids and proposals shall be evaluated as provided in this section so as to give preference to domestic bids. Each foreign bid shall be adjusted for purposes of evaluation by adding to the foreign bid (inclusive of duty) a factor of 6 percent of that bid, except that a 12-percent factor shall be used instead of the 6-percent factor if the firm submitting the low acceptable domestic bid is a small business concern or a labor surplus area concern (as defined in §§ 1-1.701 and 1-1.801, respectively), or both. * * *"

As can be seen from the above, the definition of labor surplus area concern for this purpose would be the new standard now contained in 41 CFR § 1-1.801. The new standard, at 41 CFR § 1-1.801(c) and (d), defines a labor surplus area concern as a concern that together with its first-tier subcontractors will perform substantially in a labor surplus area and the term "perform substantially" is defined as more than 50 percent of the contract price.

Since Westinghouse has not shown that it was a "certified eligible concern" nor does it meet the 50-percent standard since Sharon, Pennsylvania, is not a labor surplus area, it does not qualify for the 12-percent differential under the terms of the solicitation. However, even if Westinghouse had qualified for the additional 6 percent under the outdated regulations, the granting of the additional 6-percent differential would have violated the current regulations and a proper award could not be made on the basis of superseded clauses or regulations which conflict with the current Federal policy. Western Filament Inc., B-192148, September 25, 1978, 78-2 CPD 226. Normally, the solicitation would have to be canceled because of this deficiency.

However, Westinghouse does not qualify under the new standard since it has not shown that it will perform more than 50 percent of the contract price in a labor surplus area. Since Westinghouse does not qualify under either regulation for the 12 percent, it would not be prejudiced by an award under this solicitation.

Because of the above, we find it unnecessary to discuss the propriety of Westinghouse's submission of information to the contracting officer after bid opening.

Finally, regarding Westinghouse's contention that Hitachi may be guilty of dumping (i.e., selling at prices lower in the United States than in Japan), under the Antidumping Act of 1921, as amended, (19 U.S.C. §§ 160, et seq. (1976)), the enforcement of the act's provisions is within the jurisdiction of the Secretary of the Treasury and the United States International Trade Commission, not GAO.

The protest is denied.



Deputy Comptroller General
of the United States