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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: General Electric Company

File: B-248565; B-248565.2

Date: September 8, 1992

William L. Walsh, Jr., Esq. and J. Scott Hommer, III, Esq., Venable, Baetjer and Howard, for the protester.
Peter A. Hornbostel, Esq., Cameron & Hornbostel, for Equipamentos Villares, S.A., General Power Engineering Associates, Inc., Villares Corporation of America, Joint Venture, Inc., an interested party.
Lester Edelman, Esq., U.S. Army Corps of Engineers, for the agency.
Jeanne W. Isrin, Esq. and David Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of agency's improper evaluation under the Buy American Act is dismissed as untimely where evaluation was consistent with reasonable interpretation of Buy American Act evaluation provisions; any inconsistency in evaluation provisions was apparent on the face of the solicitation and thus had to be protested prior to bid opening.

2. Where solicitation specifically advised that bids offering Canadian products would be considered "qualifying" for purposes of applying the Buy American Act, post-bid opening protest that agency should have considered Canadian product bid to be "domestic" rather than "qualifying" for purpose of applying Act is untimely; protests of alleged deficiencies apparent on the face of the solicitation must be filed prior to bid opening in order to be timely.

DECISION

General Electric Company (GE) protests the award of a contract to Equipamentos Villares, S.A., General Power Engineering Associates, Inc., Villares Corporation of America, Joint Venture, Inc. (Villares), under invitation for bids (IFB) No. DACW57-91-B-0059, issued by the U.S. Army Corps of Engineers, for the rewinding of five generator units at the John Day Powerhouse, Washington.

We dismiss the protest as untimely filed.

The solicitation was issued on August 5, 1991, for the supply and installation of generator stator bars, connectors, and winding supplies. Section H-12 of the IFB, entitled "Buy American Act and Balance of Payments Program (Jan. 1991)," Defense Federal Acquisition Regulation Supplement (DFARS) § 52.225-7001, stated that the Buy American Act, 41 U.S.C. § 10a-d (1988), applied to the procurement, defined "domestic," "qualifying," and "nonqualifying" end products, provided that offers would be evaluated in accordance with the policies and procedures of Federal Acquisition Regulation (FAR) part 25 and DFARS part 225, and added that a 50 percent evaluation differential would be added to nonqualifying end product offers. Also included in the solicitation was DFARS § 52.225-7000, "Buy American Act--Balance of Payments Program Certificate (Nov. 1990)," requiring bidders to certify what type (domestic, qualifying, or nonqualifying) of end products they were offering.

Six bids were received by the October 4 opening date. Villares, a nonqualifying end product offeror, was the apparent low bidder. The bids then were evaluated under the Buy American Act by applying DFARS § 225.105-70; a 50 percent differential (based on the nonqualifying schedule items) was added to Villares' nonqualifying end product bid for comparison to domestic bids. This evaluation resulted in GE's bid becoming low. However, since GE's bid was deemed qualifying, and under DFARS § 225.105-70 the differential applied only if it would result in award to a firm offering domestic end products, the contracting officer reverted to the original evaluated bids, without the Buy American differential applied, to determine the low bidder. Award thus was made to Villares on April 24, 1992.

GE argues that the Corps applied the wrong DFARS Buy Americn Act evaluation provision; according to the protester, DFARS § 225.105-70, applied by the Corps, appeared in the 1991 edition of the DFARS, did not become effective until December 31, 1991, and thus did not apply to this solicitation, which was issued on August 5. GE contends that the Corps instead should have applied the prior (1988) version of the DFARS, pursuant to which it believes its bid would have been in line for award. This contention is without merit. The regulation applied by the Corps, DFARS § 225.105-70, appeared in Defense Acquisition Circular (DAC) 88-16, which was effective as of November 16, 1990, and was published in the Federal Register on November 21, 1990; the regulation therefore was included in DFARS part 225 prior to the issuance of the IFB on August 5, 1991, and thus, by the terms of the solicitation, was applicable to this procurement.

GE also argues that the pre-DAC 88-16 evaluation procedures should apply because the cover sheet to the solicitation, entitled "Information to Offerors or Quoters," stated as follows:

> "This is a Civil Works Program procurement and is not funded by the Department of Defense. Buy American Act prices differential to foreign qualifying country end products in accordance with Paragraph 225.105(75) of the Defense Federal Acquisition Regulation applies."

GE maintains that the reference to DFARS § 225.105(75), a pre-DAC 88-16 evaluation provision (which provided that the offers of qualifying country end products would not be subject to an evaluation differential) indicated that the earlier evaluation provisions would be applied to this solicitation.

This argument is unpersuasive. While the cover sheet indeed contained the reference to the old regulation, the IFB as a whole sufficiently indicated that the evaluation scheme in DAC 88-16 would be applied. Most significantly, the solicitation provision under section H-12 specifically governing evaluation of bids under the Buy American Act was dated "January 1991," indicating that the Buy American Act regulations applicable as of that date, including those in DAC 88-16, would be applied. That the agency intended to apply this updated regulation rather than the earlier version also was evidenced by the IFB definition of "qualifying country" as "any country set forth in DFARS 225.7403." This was a clear reference to DAC 88-16, since the prior version of DFARS § 225.7403 (i.e., before it was modified by DAC 88-16) did not list any countries as qualifying; the list of qualifying countries, including Canada, was added to DFARS § 225.7403 by DAC 88-16. Thus, notwithstanding the reference to the prior regulation, we find that the IFB sufficiently put GE and other offerors on notice that the new provisions would apply.

In any case, even if we did not consider the IFB clear on the point, the reference to DFARS § 225.105(75) at best gave rise to a patent ambiguity. Such ambiguities constitute deficiencies on the face of a solicitation; under our Bid Protest Regulations, such a deficiency must be protested prior to the time set for bid opening. See 4 C.F.R. § 21.2(a)(1) (1992); Med-National, Inc., B-246192, Oct. 24, 1991, 91-2 CPD ¶ 373. Since GE's protest was not filed until May 1, more than 6 months after bid opening, this aspect of the protest is untimely. Id.

In the alternative, GE maintains that its bid should have been considered domestic rather than qualifying under DFARS § 225.105-70, which would have resulted in its being the low domestic bidder in line for award after the 50 percent differential was applied to Villares' bid. This argument too is untimely. Section H-12 of the solicitation clearly stated that bids would be classified as domestic, qualifying, or nonqualifying for evaluation purposes under the Buy American Act and, as discussed above, defined qualifying country components and end products as those of "any country set forth in DFARS § 225.7403." DFARS § 225.7403 lists Canada as a qualifying country, and also refers back to DFARS § 225.105-70 as the proper regulation for evaluating bids of qualifying country end products. (Indeed, it appears that GE was well-aware that the IFB provided for treating Canadian products as qualifying country products, since prior to bid opening it wrote to the contracting officer to ask that the two solicitation clauses regarding the Buy American Act (DFARS §§ 52.225-7001 in H-12 and 52.225-7000 in section K) be modified to acknowledge that Canadian-source products would be considered domestic.[1]) Since it was apparent on the face of the solicitation that a bid of Canadian products would be considered qualifying, and not domestic, for evaluation purposes, GE's protest that a Canadian end product bid should have been evaluated as domestic had to be filed prior to bid opening to be timely. Because it was not filed until months after bid opening, this aspect of the protest is untimely and will not be considered. See Iowa-Illinois Cleaning Co., B-245543, Jan. 2, 1992, 92-1 CPD ¶ 10.

The protest is dismissed.

John M. Melody
Assistant General Counsel

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[1]Although GE's pre-bid opening letter was not cast in terms of an agency-level protest, even if we considered it to be such a protest, the Corps' proceeding with bid opening without making the requested modifications placed GE on constructive notice of adverse action; any subsequent protest to our Office therefore had to be filed within 10 working days of the October 4 bid opening. 4 C.F.R. § 21.2(a)(3). Since GE's protest on this ground was filed more than 6 months after bid opening, it nevertheless would be untimely. See Sunbelt Indus., Inc.--Recon., B-245780.2, Oct. 29, 1991, 91-2 CPD ¶ 399.