



B-159812(i)

**PUBLISHED**

MAR 10 1965

North Atlantic Fish Co., Inc.  
Commercial Street  
Gloucester, Massachusetts

Attention: Mr. Michael E. Minceo

44 PUBLISHED 539  
Comp. Gen.

Gentlemen:

Reference is made to your letters of December 18, 1964, and January 26, 1965, protesting against the awarding of a contract for frozen breaded fish portions under District of Columbia Invitation for Bids No. 89-106-5-0298-QW to a firm (R. W. Claxton, Inc., Washington, D. C.) which provided portions made from imported fish blocks.

The invitation solicited bids for furnishing, among other items, boned frozen cod fish to the District of Columbia during the period January 1 through February 28, 1965, in uncooked breaded individual portions of 4 ounces each (item 1) and precooked breaded individual portions of 3 ounces (item 3) and of 4 ounces (item 5) in the estimated quantities of 6,200 pounds, 1,820 pounds and 3,300 pounds, respectively. The portions were to be boxed in appropriate amounts and delivered in the quantities ordered to the various District of Columbia agencies located in that metropolitan area within 72 hours after request therefor.

The invitation's Specifications contained a notation which stated that with reference to frozen seafood "only a domestic product packed in the United States will be considered." Title III of the act of March 3, 1913, ch. 212, 47 Stat. 1520, 41 U.S.C. 10a-10c, commonly referred to as the Buy American Act, was incorporated by reference in the General Conditions of the invitation. Section 2 of that act, as codified in 41 U.S.C. 10a, provides as follows:

"Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced,

B-157812

or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality."

The District of Columbia is made subject to such provisions by section 1 of the act (41 U.S.C. 10c(b)) which contains definitions of the terms used in the above section.

Eight firms were solicited and the following 3 bids (exclusive of prompt payment discounts) were received on the items 1, 3 and 5 here concerned:

	<u>Item 1</u>	<u>Item 3</u>	<u>Item 5</u>	<u>Total</u>
R. W. Claxton, Inc., Washington, D. C.	\$2,337.40	\$ 795.34	\$1,442.10	\$4,574.84
Washington Fish Exchange, Inc., Arlington, Va.	2,473.80	835.38	1,514.70	4,823.88
North Atlantic Fish Co., Inc., Gloucester, Mass.	2,923.30	1,015.56	1,841.40	5,780.26

Claxton's bid offering to furnish its "Islandic" brand being low, award was made to that firm which thereafter advised that fish blocks imported from Iceland would comprise the primary raw material used in making the end product, but that "the items to be furnished will be produced by an American corporation, the Coldwater Seafood Corporation, at an American plant, located at Hants Cove, Maryland," and will be "only domestic products packed in the United States as required in the invitation." The second low bid also proposed to use imported fish blocks.

The fish blocks are stated to be blocks of from 12 to 35 pounds each of raw fish flesh that has been subjected to forming, to pressure

B-155812

which releases the natural gelatinous substances contained in fish, and to freezing. From these blocks the specified fish portions are created by the Calwater Seafood Corporation through a series of manufacturing processes consisting of portion control slicing to the required size or weight, battering, breading, precooking (where required) and packaging.

You state that the invitation's requirement for a domestic product was not adhered to in the awarding of the contract because the breaded fish portions provided by Claxton were made from imported fish blocks whereas the product offered by your firm is comprised of "seafood caught by American built vessels by American fishermen; unloaded in an American port by American union labor, cut by American union fish cutters in an American corporation processing plant, and then further processed in an American seafood processing center as a product of the U. S. A."

You quote the Buy American Act as providing that:

"a 'domestic source and product' means (A) an unmanufactured and product which has been mined or produced in the United States and (B) an end product manufactured in the United States if the cost of the components thereof which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components."

In this connection you state:

"The components of a breaded fish portion; packed under the specifications of the District of Columbia, are 75 percent fish flesh and 25 percent breading and batter. I direct your attention to the United States Department of Interior, Bureau of Commercial Fisheries, Division of Resource Development, Market News Service's Fishery Products Report B-13 for frozen fishery product prices to primary wholesalers on imported fish blocks during December 1964. The cost of components to the brand awarded the contract by the District of Columbia, mined, produced, or manufactured in the United States approach less than 25 percent of the cost of all the components provided by the winner of the award.

B-155012

"Under the law, and the Buy American Act, a serious violation has been committed by the Government of the District of Columbia against American fishing interest.  
\* \* \*

The provision which you quote does not appear in the Buy American Act, as such, although it is contained in 41 U.S.C. App. 1-7.101-14(a) (supp. V) which codifies for use in fixed-price supply contracts certain regulatory definitions contained in the Federal Procurement Regulations promulgated by the General Services Administration pursuant to, and in implementation of, Executive Order No. 10582, December 17, 1954, 19 F.R. 8723, as amended, which prescribes uniform procedures for determinations by the departments, independent establishments and other instrumentalities of the executive branch of the United States Government in the administration of the requirements of the Buy American Act.

The Government of the District of Columbia is a legal entity separate and distinct from the executive agencies of the United States. Thus, while it does not appear that the criteria set forth in E.O. No. 10582 and the implementing Federal Procurement Regulations have mandatory application to actions by the District of Columbia we have been advised informally by the D. C. Procurement Office that, generally, it recognizes and is guided by such regulations in the procurement of its supplies in situations such as this where no applicable D. C. regulations have been issued. We were also advised that the notation concerning a "domestic product packed in the United States" was made a part of the specifications to eliminate bids on breaded fish portions which had been made and packed in foreign countries. It is stated that the word "domestic" as used therein was not intended to incorporate the technical definition of a "domestic source and product" which is contained in the Federal Procurement Regulations, or to create greater limitations than required by the Buy American Act itself.

The Buy American Act was designed to accord preferential treatment to items mined, produced or manufactured in the United States where purchases were made for public use by instrumentalities of the Federal Government and by the District of Columbia. It does not constitute an absolute prohibition against the purchase of foreign supplies, and under one of the exceptions contained in the first sentence of 41 U.S.C. 10a (quoted above) the purchase of domestic articles is not required when the head of the department or independent establishment concerned determines that the cost of the U. S. items would be "unreasonable." Neither the act nor its legislative history offers

B-155812

any guideline as to what amount of excess cost for domestic products over cost for foreign products shall be considered unreasonable. Prior to December 17, 1954, the Bureau of Federal Supply, Department of the Treasury, prescribed a differential of 25 percent as the test of reasonableness of cost of domestic articles. See 13 F.R. 8762. On that date the President of the United States issued Executive Order No. 10582, which, as amended, provides in part as follows (quoting from 41 U.S.C.):

"(b) For the purposes of the said act of March 3, 1933 [sections 10a--10c of this title], and the other laws referred to in the first paragraph of the preamble of this order, the bid or offered price of materials of domestic origin shall be deemed to be unreasonable, or the purchase of such materials shall be deemed to be inconsistent with the public interest, if the bid or offered price thereof exceeds the sum of the bid or offered price of like materials of foreign origin and a differential computed as provided in subsection (c) of this section.

"(c) The executive agency concerned shall in each instance determine the amount of the differential referred to in subsection (b) of this section on the basis of one of the following-described formulas, subject to the terms thereof:

"(1) The sum determined by computing six per centum of the bid or offered price of materials of foreign origin.

"(2) The sum determined by computing ten per centum of the bid or offered price of materials of foreign origin exclusive of applicable duty and all costs incurred after arrival in the United States: provided that when the bid or offered price of materials of foreign origin amounts to less than \$25,000, the sum shall be determined by computing ten per centum of such price exclusive only of applicable duty."

That executive order also permits the establishment of a percentage differential where the low acceptable domestic bidder is a small business concern or a labor surplus area concern. Where such bids are involved section 1-6.104-4 of the Federal Procurement Regulations

B-155812

implements the executive order by prescribing a 12 percent factor instead of the 6 percent factor otherwise prescribed therein for adding to the foreign bid for evaluation against domestic bids. Somewhat similar regulations implementing E.O. No. 10582 and the Buy American Act are set forth under section 6-104.4 of the Armed Services Procurement Regulation.

While, as stated above, we do not consider the criteria set forth in E.O. No. 10582 and the implementing Federal Procurement Regulations as having mandatory application to procurements made by the District of Columbia, in the absence of pertinent D. C. regulations on the subject we do not feel that the District of Columbia should be required to observe a percentage differential for this purchase which is higher than that prescribed by the General Services Administration for the Federal executive agencies, or that the District of Columbia should be compelled to pay a higher price for the fish portions than such agencies generally would have paid under the same conditions.

In its report to this Office the D. C. Procurement Office indicates that it considers the prices bid by North Atlantic Fish Company to be unreasonable by comparison with the prices of the contract as awarded. In this connection it is noted that your firm's bid exceeds Claxton's by more than a 25 percent differential factor, which is greatly in excess of the 6 percent and 12 percent factors currently prescribed by FPR 1-6.104-4 for use in the evaluation of bids on foreign products.

Accordingly, in view of the circumstances here involved we do not feel that we are required to object to the contract awarded to Claxton, and your protest must therefore be denied. However, we believe that this procurement points out a need for the issuance by the officials of the District of Columbia of pertinent implementing instructions to the Buy American Act to serve as a firm basis for the evaluation of bids received on foreign products and on products having foreign components in connection with its procurement actions. We are therefore by letter of today calling this matter to the attention of the President of the Board of Commissioners of the District of Columbia.

Inasmuch as the record indicates that only the price factor was considered by the D. C. Procurement Office in the evaluation of the bids and subsequent awarding of the contract, and since the price differential between your all-domestic bid and the Claxton bid provides sufficient justification under accepted standards applicable to Federal

B-155812

executive agencies for the action taken in this case, we find it unnecessary to decide herein whether the end product should be regarded as having been manufactured substantially all from materials manufactured in the United States, or whether domestic fish blocks are produced in sufficient and reasonably available commercial quantities within the contemplation of the provisions of 41 U.S.C. 10a.

Very truly yours,

Joseph Campbell

Comptroller General  
of the United States