DOCUMENT RESUME

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[Protest concerning Bid Responsiveness and Buy American Act]. B-188148. August 11, 1977. 15 pp.

Decision re: Sulzer Bros., Inc.; Allis-Chalmers Corp.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).
Organization Concerned: Department of the Army: Corps of Engineers, Portland, OR.
Authority: Buy American Act. B-186543 (1976). B-185874 (1977). B-185605 (1976). B-175585 (1975). B-184810 (1975). 52 Comp. Gen. 706. 39 Comp. Gen. 595. 48 Comp. Gen. 420. 36 Comp. Gen. 415. 55 Comp. Gen. 340. 46 Comp. Gen. 315. 49 Comp. Gen. 398. 4 C.F.R. 20.10. A.S.P.R. 2-202.5. A.S.P.R. 7-2003.31(a). A.S.P.R. 2-405.

Each of two companies protested contract award to the other with disagreements expressed about responsiveness of Sulzer's bid. Issues were also raised regarding waiver of application of the Buy American Act. Since issues relating to the act were under litigation, they were not considered by GAO. The bid was found to be responsive although drawings were at variance with the solicitation. Even though the award to the low bidder was proper, the agency should review descriptive data requirements prior to future solicitations. (HTW)

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DECISION

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

FILE: B-188148 DATE: August 11, 1977

MATTER OF: Sulzer Bros., Inc., and Allis-Chalmers Corporation

DIGEST:

1. Issues regarding application of Buy American Act pending in companion case filed in District Court will not be reviewed because matters subject to litigation are considered by GAO only at court's request, which court specifically limited.

2. Bid is responsive although width of discharge tube for proposed Kaplan type turbines depicted in low bidder's bid drawings is at variance with drawings furnished as part of solicitation package. Dimension was not clearly depicted as mandatory, and bidder's interpretation was reasonable.

3. Request for descriptive data which is not necessary to proper evaluation of bid is informational in nature. Therefore, failure to furnish such information does not prevent acceptance of bid, because bidder is otherwise bound to perform in accordance with solicitation.

4. Although bid drawing showing length of discharge tube as 60 feet conflicts with drawings furnished with solicitation, which showed 62-foot length, deficiency was properly waived as immaterial variation. Difference has only relatively insignificant impact on turbine performance, and design of water passages is to be finalized based on model tests showing design is compatible with 62-foot length.

5. Notwithstanding that award to low bidder is proper, agency should review descriptive data requirements before using them in future solicitations of this type and should assure that details and dimensions are necessary for proper evaluation.

Sulzer Bros., Inc. (Sulzer), and Allis-Chalmers Corporation each protest any award to the other claiming entitlement to award under invitation for bids (IFB) DACW57-76-B-0226, issued by the Portland District Office of the Corps of Engineers (Corps). The subject IFB sought bids for a fixed-price contract to design and furnish two Kaplan type fishwater turbines for installation in the Bonneville Second Powerhouse, including delivery costs and the services of an erection engineer to assist in installation. Only the protesters bid. Sulzer's bid was low at $2,701,923. Allis-Chalmers bid $3,046,581.

The general configuration of a Kaplan type turbine is illustrated and discussed in our decision in Dominion Engineering Works, Ltd., B-186543, October 8, 1976, 76-2 CPD 324. As we indicated there, a Kaplan type turbine is a machine of considerable size, vertically mounted on concrete foundations which in turn form a channel or passage through which water passes. The intake portion of the watercourse is a passage of closed, spiral design (spiral case) through which water is directed in a vortex converging toward the turbine and down past a set of "propellers" known as "runners." The water is discharged through an outlet channel known as a draft tube, which consists of a concrete passage partially protected by a "draft tube liner." See figure 1.

Objections to the Sulzer bid were first raised by Allis-Chalmers in a letter to the contracting officer dated November 8, 1976. Allis-Chalmers questioned the responsiveness of Sulzer's bid on two grounds: (1) because in its view, Sulzer had failed to adequately indicate the principal dimensions of the spiral case on its bid drawings, and (2) those drawings showed a total draft tube outlet width of 38 feet, which Allis-Chalmers insists is 2 feet wider than permitted by the IFB.

After an exchange of correspondence between Sulzer, Allis-Chalmers, and the Corps' district office, the contracting officer found the Sulzer bid nonresponsive. He agreed the Sulzer drawings did not adequately indicate the dimensions of the spiral case.

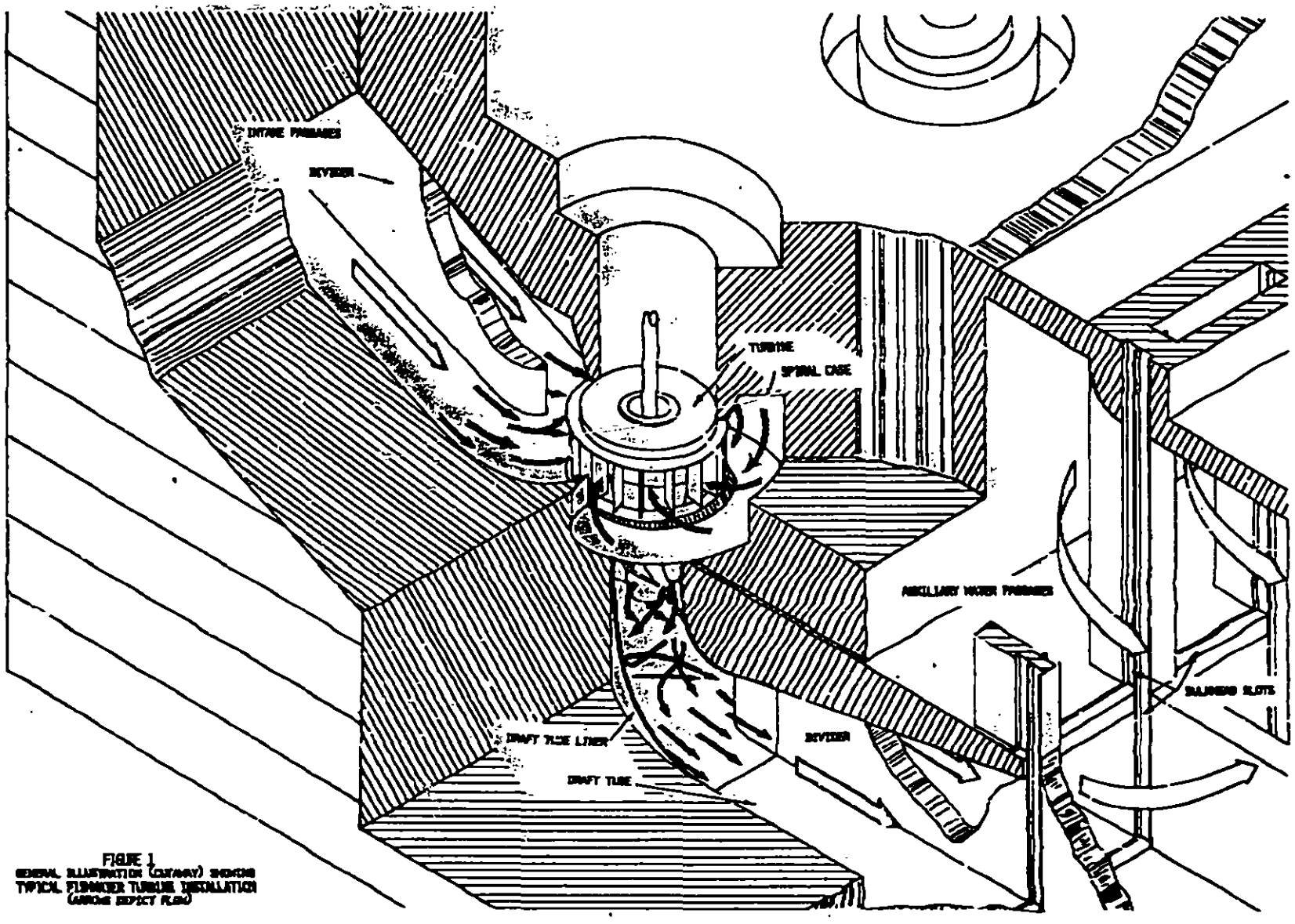

FIGURE 1
GENERAL ILLUSTRATION (CUTAWAY) SHOWING
TYPICAL FLEMMER TURBINE INSTALLATION
(ARROWS DEPICT FLOW)

While he disagreed with Allis-Chalmers' views regarding the width of the draft tube outlet, he found Sulzer's bid defective further, because the bid drawings showed a horizontally projected draft tube length of 60 feet. The solicitation drawings indicate a draft tube length of 62 feet between the spiral case centerline and draft tube end. (Illustrations showing the pertinent solicitation and bid drawings are shown in figures 2(A) and (B).)

Sulzer then protested to our Office, maintaining its drawings were prepared to scale, and the dimensions of the spiral case can be determined from them. Sulzer states that the 60-foot draft tube length was not intended, but is a mistake resulting from a draftsman's error. Moreover, Sulzer argues that this length relates wholly to work which is to be performed by the Corps and which has no effect on the price, quantity, quality, or delivery terms which would be required if Sulzer were awarded the contract for the turbines. In Sulzer's view the IFB does not require a 62-foot draft tube, but anticipates that draft tube dimensions will be conformed to the contractor's design. Sulzer has also asserted that Allis-Chalmers' bid fails to comply with the descriptive literature requirements.

The Corps reviewed the conduct of the procurement, while Sulzer's protest was pending, concluding that Sulzer's bid is responsive. The contracting officer has since concurred and reversed his prior decision.

That action is protested by Allis-Chalmers, which restates its original objections to award to Sulzer, adding as a third basis for protest Sulzer's failure to correctly indicate on its bid drawings that its design was predicated on furnishing a turbine suitable for use with a 62-foot draft tube. Concurrently, Allis-Chalmers brought suit in the United States District Court for the District of Oregon (Civil Action No. 77-289), for declaratory and injunctive relief. Its request for a temporary restraining order to prevent award until the issues raised could be resolved was denied by the court upon the contracting officer's agreement to withhold award pending our decision. At the same time, the court requested our opinion in this matter.

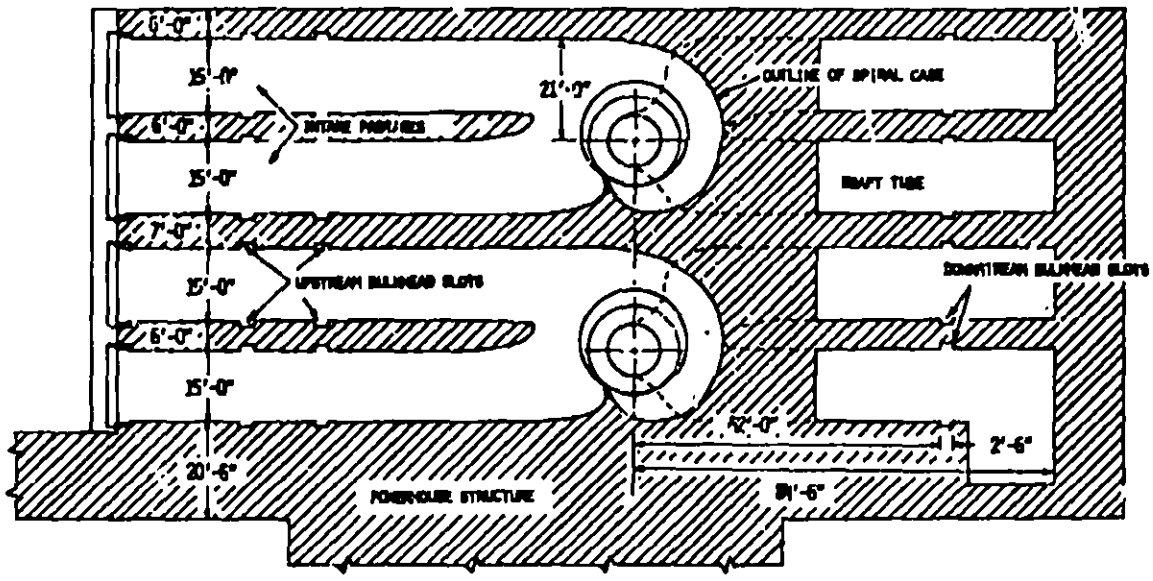

FIGURE 2(A)
ESSENTIAL DETAIL SHOWN ON CORPS DRAWING NDP-1-5-0/8, SECTION A-A, FISHWATER TUNNEL WATER PASSAGE.

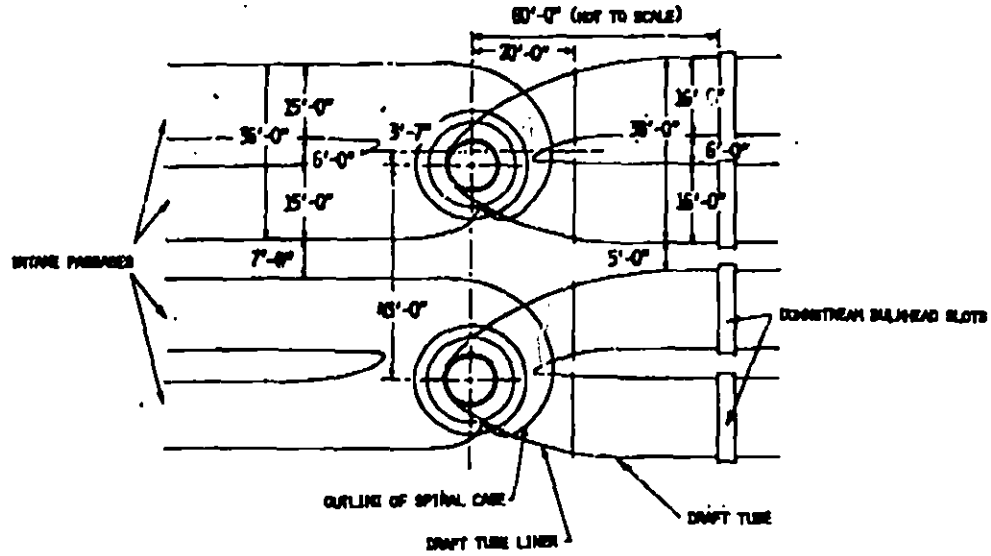

FIGURE 2(B)
CORRESPONDING DETAIL SHOWN ON SULZER BIS DRAWING

(LABELLING OF PARTS ADDED, BOTH DRAWINGS)

In the course of the litigation additional issues have been raised regarding a waiver of the application of the Buy American Act said to implement a Memorandum of Understanding with the government of Switzerland stemming from that country's purchase of certain aircraft from United States sources. In this regard, the District Court asked in a letter to our Office received July 5, 1977, that we respond only to those issues which were raised by Allis-Chalmers in its original complaint. As a matter of long standing policy, this Office will not review issues which are involved in litigation before a court of competent jurisdiction except as the court expresses an interest in our opinion. Sovereign Construction Co., B-185874, March 8, 1977, 77-1 CPD 168; 52 Comp. Gen. 706 (1973); see, also, 4 C.F.R. § 20.10 (1976). Consistent with that policy, we limit our review of this protest to those issues which were raised by Allis-Chalmers regarding the acceptability of the Sulzer bid.

Regarding Allis-Chalmers' contention that the width of the discharge channel or draft tube shown on Sulzer's bid drawing (figure 2(B)), i.e., 38 feet, conflicts with what it views as the dimensional requirements contained in the Corps' drawings (see figure 2(A)), paragraph SC-2.1 of the IFB provides that the work is to conform to the solicitation drawings listed in that paragraph. Paragraph SC-2.2 reads as follows:

> "The drawings are not to be considered as defining the design of the equipment to be furnished, but are merely illustrative of the specifications and show the general layout of the equipment, except where limiting or mandatory dimensions and elevations are indicated. Minor modifications of the power plant design will be made, if necessary, to suit the design of the equipment furnished by the Contractor * * *." (Emphasis added.)

Although the IFB does not specifically define what is meant by a "limiting" or "mandatory" dimension, comparison of the quoted language with the solicitation drawings suggests that importance is attached to those coordinates or quantities which are expressed quantitatively, by "dimensions," as distinguished from other characteristics which are qualitatively depicted. It is in our view consistent that bidders would assume that distances expressed by arabic dimensions were meant to denote specific requirements, i.e., limiting or mandatory dimensions, but that other features graphically depicted could be varied at least within reasonable limits.

As appears on the face of the Corps' drawings (figures 2(A) and 3(B)), the draft tubes are not mere physical extensions of the intake passages, but are separated by the spiral case and turbine. The vertical position of the two parts differ considerably. See figure 3(B). While the Corps included dimensions indicating the width and distance between the intake channels, it omitted similar dimensions for the draft tubes and did not otherwise indicate on its drawings that the same dimensions applied.[1] The draft tube outlet is shown on a second of the Corps' drawings (reproduced here as figure 3(A)), while the intake passages are shown on a third drawing (not reproduced). Again, the dimensions of the intake passages are shown; those for the outlet are not.[2]

In the circumstances, it appears reasonable that Sulzer believed a 38-foot draft tube outlet width was permissible. Even if the Corps meant to require a 36-foot dimension, a bid cannot be found nonresponsive if it conforms to the bidder's reasonable interpretation of the solicitation requirements. See, e.g., Dominion Engineering Works, Ltd., supra.

A somewhat more complex analysis is required to deal with Allis-Chalmers' complaint that the Sulzer bid is nonresponsive because it failed to show the principal dimensions of the spiral case. Paragraph (C)4.3(2)(a) of the IFB requires that bidders

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[1]In a report to this Office, it is disclosed that the Corps meant to include a 36-foot draft tube dimension on its drawings. The dimension was inadvertently omitted. Although acceptance of the Sulzer bid will result in additional cost to alter the powerhouse design, the cost is substantially less than the difference between the Sulzer and Allis-Chalmers bids, and apparently is not believed by the Corps to be sufficient to justify rejection of all bids, and resolicitation.

[2]Actually, the width of the draft tube shown on the two solicitation drawings furnished our Office would appear to be somewhat less than 36 feet, determined by reference to the scale graphically depicted on them.

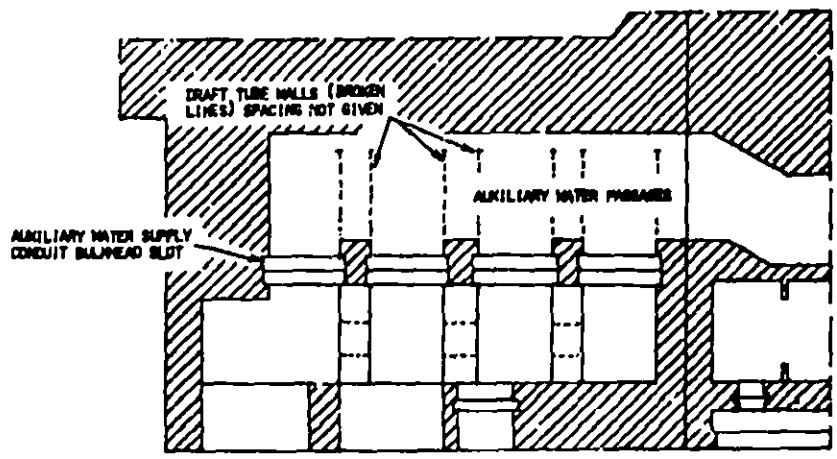

FIGURE 3(A)
ERECTION BAY PARTIAL PLAN
AS SHOWN ON CORPS DRAWING
NO. 1-3-076

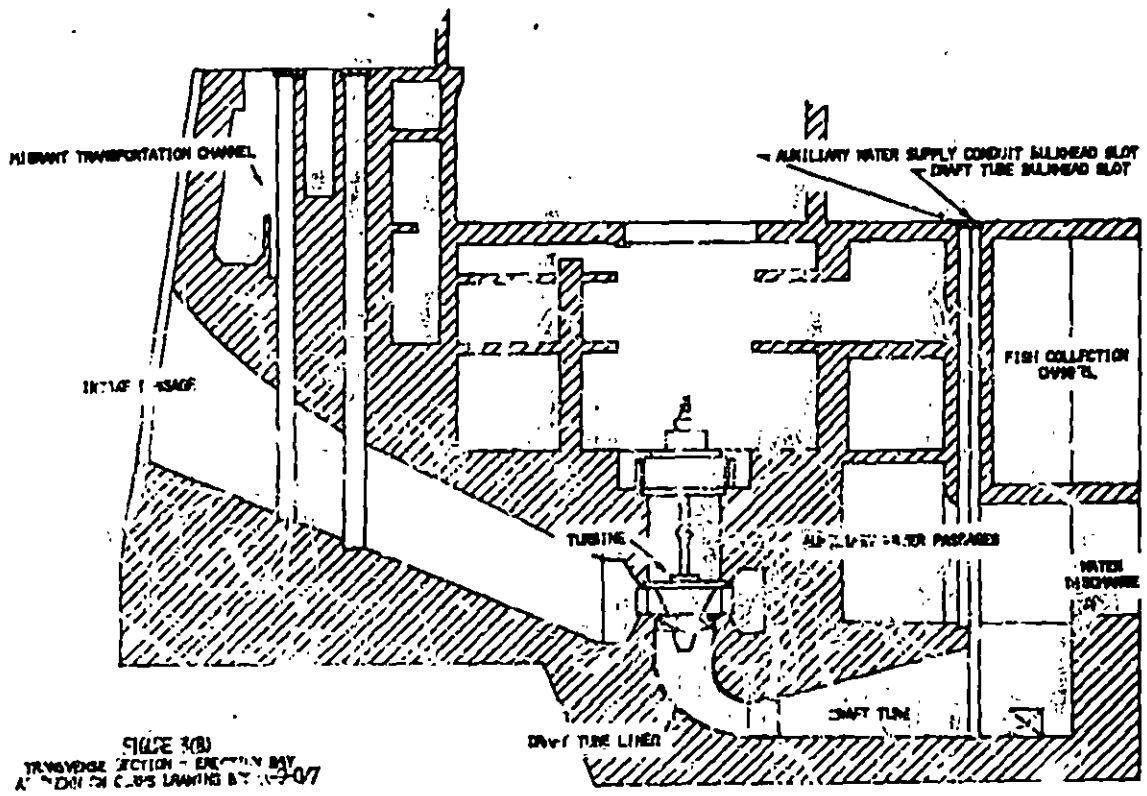

FIGURE 3(B)
TRANSVERSE SECTION - ERECTION BAY
AS SHOWN ON CORPS DRAWING NO. 1-3-077

show on their bid drawings the "principal dimensions" of the spiral case and variously required, also, that those drawings illustrate: (a) the "general construction" and "overall dimensions" of the turbines proposed, (b) the "governing dimensions" of specified parts, and (c) the "principal dimensions" of the draft tube.

Allis-Chalmers argues that the term, "dimensions," refers to the use of arabic numerals and that the requirement that dimensions be shown should be interpreted to mean that bidders were required to quantify their bid drawings by including numerical values expressed in appropriate units of measure indicating pertinent details of the spiral case outline. It asserts that "dimensioning" as used in the trade is understood to refer to the use of numerically expressed values, while extrapolation of dimensions by "scaling" from drawings is not acceptable industry practice.[3]

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[3] Literally, the language used in paragraph (C)4.3(2)(a) would seem to support Allis-Chalmers' view, which we agree is consistent with the meaning ordinarily ascribed to the word "dimensions" in this context. "Principal dimensions" is not defined. "Principal" imports the notion of being most important, i.e., of chief importance, significance or influence. One speaks of the "principal focus" in optics as the point where a beam of incident light parallel to the axis will focus. The principal form of a thing is understood to be that which constitutes or determines a philosophical species, distinguishing it from others. Webster's Third New International Dictionary, 1802, 1903 (1966). Used in connection with the description of a geometrical shape, the phrase "principal dimensions of the spiral case outline" seems intended to suggest more than an indefinite intention that bidders depict a mere outline of a proposed shape, a view which is reinforced by examination of the language of paragraph (C)4.3(2)(a), which refers specifically and separately to drawings and those dimensions which must be shown. The difficulty with this view is that it cannot be taken very far, since a spiral cannot be defined analytically by stating a few "principal dimensions," without more. Unlike the words "elipse" or "square" the term, "spiral," refers only to a generic class of geometric shapes. See id., 2197, cf. CRC, Handbook of Tables for Mathematics, 529 (1975).

Sulzer contends that its drawings were prepared to scale and that the pertinent dimensions can be ascertained by converting measurements made from the drawings. Its drawings indicate that a scale of 50:1 was used. That scale is indicated on the drawings, which, consequently, purport to be drawn to scale if taken on their face. In Sulzer's view, scaling is entirely appropriate.

The Corps now agrees with Sulzer. Arguing that the dimensions of the spiral case can be adequately determined from Sulzer's drawings,[4] the Corps expresses satisfaction with Sulzer's proposed design. In that regard, it notes that the spiral case outline was required to be shown so that the Corps could assure itself that the proposed turbine was compatible with the powerhouse design.

In the view we take of the case, we do not find it necessary to determine whether the Sulzer bid drawing was in this respect technically noncompliant with the paragraph (C)4.3(2)(a) requirement. At worst, we believe the requirement sought information which was not material to bid evaluation and consequently the deficiency, if any, should be waived.

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[4]Initially, the Corps found that Sulzer's drawings could not be scaled because some of the quantities for which numeric descriptions were given were inconsistent with the indicated 50:1 scale, as well as with other dimensions expressed on them. In reversing this position, the contracting officer found that:

> "* * * it is reasonable to believe that * * * [Sulzer] did not find it necessary to draw those dimensions to scale which it showed with arabic numerals. If one accepts this premise, the confusion concerning the scale of the drawings is dissolved."

Although the dimensions indicated for the intake and discharge tube are consistent with each other, those showing the distance between the two water passages are not consistent with them. The contracting officer's supposition does not explain why Sulzer specifically indicated on the drawings that the 60-foot indicated draft tube length was not drawn to scale, but omitted similar qualifications elsewhere.

Allis-Chalmers emphasizes that the solicitation states that failure to furnish all of the descriptive data requested would result in rejection of the bid as nonresponsive. While an IFB warning that failure to comply with a particular requirement will result in rejection of bids may establish that the information is material, it is not made material solely because warning is given. 39 Comp. Gen. 595 (1960). Even though requested in a specific form, data in some other form may be sufficient to permit proper evaluation. 39 Comp. Gen. 595, supra; 48 Comp. Gen. 420 (1968); B-175585, November 8, 1972. Also, the data may not have been needed for evaluation and is not therefore material. Cf., e.g., Acorn Building Components, Inc., B-185605, July 1, 1976, 76-2 CPD 1, aff'd. sub nom. B-185605, July 22, 1976, 76-2 CPD 68.

Notwithstanding a requirement for descriptive data, a bid should not be automatically rejected for failure to furnish descriptive data where it is not material. In this connection, as stated in 49 Comp. Gen. 553, 556 (1970),

> "* * * the test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof. Unless something on the face of the bid, or specifically a part thereof, either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the invitation, it is responsive."

Descriptive literature which may be required pursuant to Armed Services Procurement Regulation (ASPR) § 2-202.5 (1976 ed.) includes only information necessary to determine the acceptability of a product, to enable the agency to determine whether the product meets the specifications, and to establish exactly what the bidder proposes to furnish. In that connection, ASPR § 2-202.5(d) provides that the IFB must state what literature is to be furnished, why it is required, and how it will be considered in the evaluation of bids.

Where the procurement of a technically sophisticated product is required, the possibility that the Government's requirements may be misunderstood, and no agreement reached, necessitates in

some instances a requirement that bidders submit descriptive data, to establish that they actually do understand and agree to perform in accordance with the terms and conditions stated in the IFB. Cf., e.g., 36 Comp. Gen. 415 (1956). Failure to furnish material data requires rejection of an otherwise conforming bid where its omission creates a possible ambiguity as to the offeror's understanding of the solicitation and intention to comply therewith. Whether an omission of data creates an ambiguity is ordinarily a matter of judgment, requiring the exercise of sound discretion by contracting personnel. For example, in White Plains Electrical Supply Co., 55 Comp. Gen. 340 (1975), 75-2 CPD 205, we indicated that a bidder's failure to indicate the manufacturer and catalog number of an offered item involved an omission of purely informational data which did not require rejection of the bid because it was clear that the bidder was bound to furnish a product conforming to the specifications.

Following the general form prescribed by ASPR § 7-2003.31(a) (1976 ed.), paragraph (C)4.1 of the IFB required that bidders submit the descriptive literature listed in paragraph (C)4.3 "to establish, for purposes of bid evaluation and award, details of the products the bidder proposes to furnish * * *." Paragraph (C)4.3 does not further explain the purpose of or the extent to which the data is to be considered. As stated in our decision in Dominion Engineering, supra, involving essentially identical provisions, the requirements of paragraph (C)4.3(2)(a) for bid drawings are to:

> "* * * be read in conjunction with those other provisions of the IFB which indicate * * * that design refinement * * *[is] to be a matter for contract performance, i.e. that detailed design drawings and model testing were to be performed after contract formation, as part of contract performance * * *." Dominion Engineering Works, Ltd., supra.

Paragraph SC-3.1 provides that final drawings regarding foundation and powerhouse construction are to be submitted within 90 days of award, subject to changes required following model testing, while paragraph SC-2.2 specifically states, in addition to the portion quoted earlier, that final design of the water passages is to be based on model testing conducted after award is made, subject to the limitations shown on the solicitation drawings and general construction of the powerhouse.

B-183138

Although the design of the intake and discharge passages is as much a part of the design of the turbine as is the equipment to be furnished, the IFB is written in a manner requiring only that bidders submit preliminary design data. To determine whether a proposed design is consistent with the operational characteristics claimed for it, it would be necessary to know not only the dimensions and form of the spiral case outline, but other details of its design, e.g., how the height (and consequently its cross-sectional shape) will vary about the turbine centerline. Analysis of the flow patterns which would be generated across the full range of required performance is complicated, at best.

If we understand the Corps correctly, the requirement that the dimensions of the spiral case outline be shown could add little or nothing to the Corps' evaluation of bids, which must be based upon the standards established in the IFB. The salient characteristics of the proposed powerhouse design are shown by use of solicitation drawings and those "limiting and mandatory dimensions" which, as discussed, were indicated on them. No physical constraint on the definition of the spiral case is shown, so that drawings which simply copied the information furnished by the Corps, on its drawings, would have been sufficient to demonstrate that the design proposed was not inconsistent with those restrictions which were actually expressed.

As noted in White Plains, we have consistently held that if the descriptive literature requirement can be met by parroting back the specifications, the legitimacy of the requirement is questionable, because the information requested would not appear to be necessary to determine the responsiveness of the bid. 46 Comp. Gen. 315 (1966); 49 Comp. Gen. 398 (1969); White Plains Electrical Supply Co., supra. As shown on the drawings illustrated in figures 2(A) and 2(B), the draft tube outline described by Sulzer in its bid is not inconsistent with the sketch of the same feature supplied by the Corps in the solicitation drawings. Absent requirements restricting the arrangement of the water passages, beyond those shown in the Corps' drawings we see no basis upon which it could be reasonably concluded that Sulzer's alleged failure to furnish a more complete description of the spiral case outline could in any way contribute to ambiguity regarding its understanding and willingness to be bound by the IFB requirements. In our opinion, any technical deficiency resulting from this aspect of its drawings should be waived as immaterial.

Allis-Chalmers' final contention is that the Sulzer bid is nonresponsive because its bid drawing indicates a horizontally projected draft tube length of 60 feet, not 62 feet.[5]

As explained by the contracting officer in his initial report, the "significance of the name 'fishwater' concerns the fact that the discharge water from these turbines will be used in an attraction channel for anadromous fish heading upstream." The Corps' drawings show that water from the discharge tube flows into a complex arrangement of basins and passages, and is mixed in the water auxiliary passages to be discharged into water of varying depths, through various ports. (See figures 1, 2(A), 3(A) and (B).) The dimensions of the basins and passages are not fully specified, except for elevation, and it appears that the dimensions of the passages and their arrangement are not the same for adjacent passages extending from each side of either draft tube, or from one turbine to the other. (See figure 3(A).)

For the reasons stated earlier, we are of the opinion that the 62-foot figure was meant to be taken as a "limiting or mandatory dimension" as that phrase is used in paragraph SC-2.2. The specifications state that construction of the draft tube is to conform to general space requirements and to specific dimensions and elevations shown on the drawings. However, a deficiency may be waived if it is merely a minor informality or irregularity going to a matter of form or is an immaterial variation from the exact requirements of the IFB, which has no effect, or only a trivial or negligible impact, on the price, quality, quantity or delivery terms of the contract. ASPR § 2-405 (1976 ed.).

A protester has no right to insist upon the enforcement of provisions in a solicitation when the waiver of such provisions would not adversely impact on the Government's material requirements and acceptance of the bid would not result in prejudice to the legal position of other bidders. Cf. Thomas Construction Co., B-184810, October 21, 1975, 75-2 CPD 248. As the Corps points out, it, not the contractor, is to construct the draft tube. The contractor will supply a draft tube liner 20 feet in length, the turbine, and a design for the water passages. We are aware of no evidence indicating that bidders whose design would utilize a 60-foot rather than 62-foot draft tube length gain any competitive advantage.

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[5]Although Sulzer indicates that the discrepancy actually resulted from a draftsman's mistake, a mistake in bid may not be corrected if the result would be to make a nonresponsive bid responsive. General Electric Co., B-184873, May 4, 1976, 76-1 CPD 298.

Allis-Chalmers suggests that the difference might have some effect on efficiency, which it argues is required to be guaranteed by the contractor. In this regard, we note that it is not the efficiency of the turbine which is guaranteed. The IFB states that efficiency is not part of the performance testing of the turbines. Rather, the solicitation correctly reflects the difficulty to be encountered in reducing to practice a turbine design intended for application in a powerhouse of the complexity proposed. The contractor guarantees only the efficiency of his model, agreeing that the design of the water passages will be finalized after model tests are run. That portion of the IFB which describes model testing states specifically that construction of the model will assume use of a 62-foot draft tube.

Sulzer's technical analysis is in agreement with our view that a change of 2 feet in discharge tube length would have at most a merely negligible impact on performance of the full scale turbines, given all of the circumstances shown. In the absence of prejudice, we believe the asserted discrepancy may be waived as an immaterial variation, inasmuch as Sulzer remains bound to furnish equipment, and a design, substantially in compliance with the solicitation requirements.

Accordingly, Allis-Chalmers' protest is denied. The protest filed by Sulzer is dismissed as moot.

Nevertheless, for the reasons stated, we are by separate letter of today advising the Secretary of the Army that the Corps should review its descriptive data requirements to assure that details and dimensions solicited are actually necessary to make a proper evaluation. Bidders should not be required simply to parrot information given them by the Corps in its solicitation drawings. If data defining the spiral case is to be required, apart from that given on the Corps' drawings, the reasons for requiring such data, and an adequate definition of the parameters sought, should be provided.

R. F. Keller

Deputy Comptroller General
of the United States