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DECISION



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

FILE: B-195311

DATE: December 7, 1979

MATTER OF: Allis-Chalmers Corporation ^{C157}

[Protest Alleging Method of Bid Evaluation Violates Buy American Act]

DIGEST:

1. Post-delivery costs of installing foreign turbines in dam may be excluded from application of Buy American Act differential even though costs include some final assembly costs, since turbines cannot be delivered or installed fully assembled due to large size. End product delivered to Government to which differential is to be applied is, by necessity, turbine subassemblies.
2. Where IFB does not have provision which elicits sufficient information to determine whether bidder qualifies as labor surplus area (LSA) concern bidder may submit information after bid opening to establish LSA status.

2 / Allis-Chalmers Corporation (Allis-Chalmers) has protested the award of a fixed-price contract to Hitachi America, Ltd. (Hitachi), for the design, manufacture and installation of two Francis-type hydraulic turbines, including spare parts, to be installed in the Amistad Dam Powerplant on the Rio Grande River, Texas. The contract was awarded under invitation for bids (IFB) 79-3, issued by the Army Corps of Engineers, 41 Fort Worth District, for the United States Section of the International Boundary and Water Commission (the Section). Allis-Chalmers alleges that the Corps' method of evaluating bids violates the Buy American Act (the Act), 41 U.S.C. § 10(a)-(d) (1976), and Executive Order (E.O.) No. 10582, December 17, 1954, 19 Fed. Reg. 8723, as amended by E.O. No. 11051, September 27, 1962, 27 Fed. Reg. 9683, and Federal Procurement Regulations (FPR) § 1-6.1 (1964 ed. circ. 1), which implemented the Act.

For the following reasons, Allis-Chalmers' protest is denied.

Background

The IFB included a schedule of items 00001 through 0018. Items 00001 (Provide turbines) through 0007 were

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grouped together and labeled HYDRAULIC TURBINES. Items 0008 through 0016 were grouped together and labeled SPARE PARTS. Items 0017 (Install turbines) and 0018 (Services of erecting engineer) were labeled WORK AT DAMSITE. Prices were to be submitted for all line items, except 0006. Award was to be made on the basis of the total bid.

Allis-Chalmers submitted a total bid price of \$4,005,800 which, after subtraction of an amount for testing costs and a 1-percent discount, was evaluated at \$3,768,979.50. Hitachi bid \$3,400,000, which was evaluated in the following manner:

\$3,400,000	-	Total Bid Price
<u>- 999,550</u>	-	Price for turbine installation (Items 0017 and 0018)
2,400,450		
x <u> .06</u>	-	Buy American Act Differential
144,027		
+ 2,400,450		
<u>2,544,477</u>		
60,000	-	Foreign Inspection
+ <u>999,550</u>	-	Items 0017 and 0018
<u>\$3,604,027</u>	-	Evaluated price

Using this evaluation method, Hitachi was the low bidder by \$164,952.50.

The Section explains its evaluation method as follows. Since Hitachi's turbines are not domestic end products, the implementing E.O.'s and regulations of the Act require that 6 percent of its bid price be added to its bid for evaluation purposes. An additional 6 percent would be added if the low domestic bidder is going to incur 50 percent of its costs in a Labor Surplus Area (LSA). The Section decided to apply only 6 percent because Allis-Chalmers stated in its bid that its "Principal Place of Performance" would be the main plant of its Hydro-Turbine Division at East Berlin Road, York, Pennsylvania. That plant is not in an LSA.

Before applying the 6-percent differential to Hitachi's bid, the Section subtracted the price for installation of the turbines (items 0017 and 0018).

This was done in accordance with General Condition GC-3.2 of the IFB which provides that "End products are the items to be delivered to the Government, * * * but excluding installation and other services to be performed after delivery." The solicitation requires delivery of items 00001 through 0016 "f.o.b. railroad cars at Del Rio, Texas," about 12 miles from the dam site. Therefore, the Buy American Act differential was not applied to installation of the turbines because installation was considered a post-delivery service not a part of the end product--the turbines as delivered.

Allis-Chalmers protested to GAO on June 28, 1979. Award was made on September 5, 1979. On September 12, 1979, Allis-Chalmers filed a complaint for declaratory and injunctive relief in the United States District Court for the Middle District of Pennsylvania (Civil Docket No. 79-1153). By letter dated October 30, 1979, the court requested our opinion in the matter. DLG03490

Grounds of Protest

First, Allis-Chalmers argues that the Section should have applied a 12-percent differential to Hitachi's bid because Allis-Chalmers will incur more than 50 percent of its costs in LSA's. Allis-Chalmers notified the Section of this by telex after bid opening when it learned that the Section intended to apply only a 6-percent differential to Hitachi's bid. Allis-Chalmers contends that the fact that it listed a plant not in an LSA as its "Principal Place of Performance" does not preclude it from showing, after bid opening, that it will incur more than 50 percent of its costs in LSA's.

Second, Allis-Chalmers argues that the Act, the E.O.'s and the FPR require the differential to be applied to the entire bid price, including the price of installation of the turbines. According to Allis-Chalmers, the turbines are only partially assembled when delivered and the "installation" is in fact the final assembly/manufacturing step. Since the end product is a fully assembled turbine, not merely the components, the differential must be applied to the entire bid price.

In order to be the low bidder, Allis-Chalmers must prevail on both issues it raises.

Timeliness

In its comments regarding a conference on the merits of the protest held at GAO on October 5, 1979, the Section first argued that Allis-Chalmers' protest concerning the issue of excluding installation costs was not timely. The Section contends that Allis-Chalmers is attacking provisions of the IFB and that such protests are required to be filed prior to bid opening by our Bid Protest Procedures, specifically 4 C.F.R. § 20.2(b)(1) (1979).

Allis-Chalmers argues that while General Condition GC-3.2 of the IFB did state that installation costs would be excluded from the end product costs, it had no way of knowing from the IFB that the excluded installation costs would include costs of turbine assembly at the dam site.

It is unnecessary to resolve this question since, even if the protest is untimely, it is our policy to decide the merits of an untimely protest when the matter is before a court and that court has expressed an interest in our opinion. Dynalectron Corporation, et al., 54 Comp. Gen. 1009, 1011-12 (1975), 75-1 CPD 341; 4 C.F.R. § 20.10 (1979).

Exclusion of Installation Costs

Allis-Chalmers argues, as follows, that the plain language of E.O. No. 10582, supra, requires the Buy American differential to be applied to the entire bid price of bids determined to be "foreign." Section 2(b) provides:

"For the purposes of the said act of March 3, 1933 [Buy American Act] * * *, the bid or offered price of materials of domestic origin shall be deemed to be unreasonable * * * 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." (Emphasis added by Allis-Chalmers.)

Section 1(c) of the E.O. defines "bid or offered price of materials of foreign origin" as "the bid or offered price of such materials delivered at the place specified in the invitation to bid including applicable duty and all costs incurred after arrival in the United States." (Emphasis added by Allis-Chalmers.) Therefore, once a bid is classified as foreign, the differential applies to the entire bid price. Similarly, Allis-Chalmers argues that the plain language of FPR § 1-6.104-4(b), which provides that "* * * [e]ach foreign bid shall be adjusted" by the appropriate differential, requires the differential to be applied to the entire bid price. (Emphasis added by Allis-Chalmers.)

Allis-Chalmers argues further that the end products to be delivered to the Government are two fully assembled turbines, not unassembled components. According to Allis-Chalmers, because of the size of the turbines, various subassemblies (or components) are manufactured in the factory and shipped to the delivery point. Then when the turbines are "installed," the components are assembled into the finished turbines--the end products. This assembly/installation at the dam site involves exactly the same manufacturing processes that would be completed in the factory if the turbines were small enough to be shipped as fully assembled units. Therefore, the cost of the end product must include items 0017 and 0018, which are arbitrarily labeled installation costs, but which are really the costs of the final turbine manufacturing process. The Section's evaluation method then improperly applies the differential to only the cost of the components, instead of to the cost of the end product as the Act, the E.O.'s and the FPR require.

Allis-Chalmers contends that the exclusion of installation and assembly costs from the differential could result in foreign bidders submitting unbalanced bids whenever final assembly and installation of the end product is in the United States so that they may minimize the effect of the Buy American differential.

Additionally, Allis-Chalmers states that the costs for the various line items are only estimates not binding on the bidder. Any change from the stated price would render the previous application of the differential inaccurate.

Allis-Chalmers has cited 46 Comp. Gen. 813 (1967) for the proposition that assembling a turbine is a manufacturing process and that a unit is required as the end product, not just components. 48 Comp. Gen. 384 (1968) is also cited as support for the argument that a unit is required as the end product. 50 Comp. Gen. 697 (1971) and 39 Comp. Gen. 695 (1960) are cited for the proposition that the costs of components include assembly costs and that by analogy the cost of the end product must include assembly costs of the components. Finally, Allis-Chalmers cites Imperial Eastman Corporation, Thorsen Tool Company, 53 Comp. Gen. 726 (1974), 74-1 CPD 153, in support of its arguments concerning unbalanced bids.

The Section and Hitachi basically argue that the Act, the E.O.'s and the FPR permit the exclusion of installation costs from the bid price for the purpose of applying the Buy American differential. They contend that the language of E.O. No. 10582 defining the term "bid or offered price of materials of foreign origin" as "the bid or offered price of such materials delivered at the place specified in the invitation to bid including applicable duty and all costs incurred after arrival in the United States" clearly refers to costs incurred before delivery. Hitachi points out that the FPR defines "foreign bid" as "a bid or offered price for a foreign end product," FPR § 1-6.101(g), and that FPR § 1.6.101(a) provides that "* * * [a]s to a given contract the end products are the items to be delivered to the Government, as specified in the contract." Therefore, the differential applies only to the price of items delivered to the Government-- here, the partially assembled turbines.

We agree with the Section and Hitachi that the language of the Act, the E.O. and the FPR does not prohibit the exclusion of installation costs and other services incurred or provided after delivery

to the Government of the end product before application of the Buy American differential. Allis-Chalmers appears to admit this when it states that 41 Comp. Gen. 70 (1961) and 53 Comp. Gen. 259 (1973) "* * * simply stand for the proposition that installation costs may properly be excluded from application of the Buy American differentials." Of course, the key issue here is what constitutes the end product. Is it the fully assembled and installed turbine as Allis-Chalmers argues? Or is it the total of the subassemblies delivered to the Government at Del Rio as the Section and Hitachi argue?

Hitachi and the Section have cited two cases which they argue are dispositive of this protest, 41 Comp. Gen. 70 (1961) and 53 Comp. Gen. 259 (1973). 41 Comp. Gen. 70 involved a contract to furnish and install eight hydraulic turbine generators for the Glen Canyon Dam. In the transmittal letter to the Secretary of the Interior, we stated that the portion of the solicitation that required the Buy American Act differential to be computed on the basis of the total bid price, including installation and testing after delivery, was defective. We went on to say that the Act, the E.O. and the FPR require computation of the differential on the basis of the cost of the foreign supplies delivered to the destination, excluding "additional costs involved in installation or other services to be performed after delivery." As an additional reason for this approach, we stated that where contracts involve both supply and construction elements, those elements should be separated both for application of the Act and to furnish a precise basis for determination of the applicability of pertinent labor laws.

53 Comp. Gen. 259 (1973) involved a contract for the manufacture and installation of power circuit breakers. The Government had excluded the price for the services of the installation engineer from the bid price before applying the Buy American differential. The protester argued that the costs were a component of the end product--installed circuit breakers. We stated that 41 Comp. Gen. 70 was properly applicable to this situation and that:

"* * * Components, as defined in FPR 1.6.101(b), means those articles, materials, and supplies which are directly incorporated in an end product. Since the installation engineering services and related travel costs here are not articles, materials, or supplies, and because the services are performed after delivery of the manufactured (incorporated) circuit breakers, we do not agree that the engineer's travel cost is a component of the delivered end item subject to the Buy American factor."

Allis-Chalmers acknowledges that these cases permit the exclusion of installation costs from the bid price before application of the differential. Allis-Chalmers argues that these cases are distinguishable from this case because those cases involved delivery of fully assembled end products to the Government and that the installation costs there did not include assembly costs.

While 53 Comp. Gen. 259 does appear to involve fully assembled end products, 41 Comp. Gen. 70 is, in fact, directly on point and, in our opinion, is dispositive of the instant protest. The generators which we stated should be considered the end product for application of the differential were not delivered to the dam in a fully assembled state to be installed. Rather, due to the size of the units, numerous subassemblies were manufactured in the contractor's factory and then transported to the dam site. There, the generators were assembled and installed in the dam powerhouse in stages as the powerhouse was constructed. See Technical Record of Design and Construction, Glen Canyon Dam and Powerplant, pp. 499-503.

We recognize that certain of the cases cited by Allis-Chalmers support the general proposition that an end product is usually the fully assembled item or items to be delivered under the contract, not just the sum of the components. See, e.g., 46 Comp. Gen. 813, supra, and 53 Comp. Gen. 72, supra. However, those cases involve substantial factual differences from the present case while the facts in 41 Comp. Gen. 70, supra, are indistinguishable from the facts here.

In determining what constitutes an end product, the purpose and structure of the procurement must be considered. See 48 Comp. Gen. 384, *supra*. Procurements for the delivery and installation of large generators and turbines are unique in a number of ways. They are hybrid procurements involving both substantial supply contract and construction contract elements. In fact, in the past, many of these procurements were handled with two separate contracts--a supply contract for manufacture and delivery of the partially assembled turbines or generators and a construction contract for the powerhouse including the assembly/installation of generators and turbines.

The reason for such an approach was twofold. First, most turbines and/or generators are so large that they must be delivered unassembled. Second, installation of generators and/or turbines of this size must be done in stages as the construction of the powerhouse progresses. Generally, it would not be feasible or possible to "install" a large turbine or generator as a fully assembled unit, since the assembly/installation is integral to the construction of the powerhouse.

Where the procurement is conducted with two discrete contracts, the manner in which the Buy American Act differential should be applied is obvious. The total of the unassembled subassemblies delivered to the Government under the supply contract is the end product for that contract and the differential would apply to that. No differential would be applied to the bid price of the construction/assembly installation contract even though that contract resulted in the final assembled, functioning turbine or generator. We see no reason why this rationale should not be applicable when the awarded contract includes both stages discussed above.

Concerning Allis-Chalmers' argument that exclusion of installation costs may encourage unbalanced bids, there is no argument or evidence showing that Hitachi's bid was unbalanced here. Allis-Chalmers' argument is mere speculation. In any event, we think that the rule that materially unbalanced bids must be rejected, see, generally, Edward B. Friel, Inc., 55 Comp.

Gen. 231 (1975), 75-2 CPD 164, in combination with the ability of the agency to detect a materially unbalanced bid by comparing other bids and its own estimates, will sufficiently deter unbalanced bidding.

We disagree with Allis-Chalmers' contention that bidders are not bound by the item prices they bid. Page one of the IFB provides that the bidder agrees "* * * to furnish any or all items upon which prices are offered at the price set opposite each item." While, as Allis-Chalmers argues, the schedule of items provides that the successful bidder will be determined on the basis of the total bid, that does not necessarily conflict with holding bidders to the unit price offered for each item. In fact, the IFB provides that items 0004 and 0005 may be awarded at the option of the Government either with the remainder of the contract, at a later date at the price bid, or not at all. Therefore, it is clear that bidders are bound by their prices for those items. We see no reason that they are not similarly bound by prices bid for each other item.

Proper Differential

Even though Hitachi's bid is low when installation costs are excluded from its bid before application of the differential regardless of whether the differential is 6 or 12 percent, we are providing our comments on the issue for the court's information.

The IFB provision "Principal Place of Performance" required bidders to identify "* * * the actual location of the plant or place of business where the items will be produced or supplied * * *." Principal place of performance was defined as "* * * the prime contractor's final assembly point of a manufactured article * * *." Allis-Chalmers listed the main plant of its Hydro-Turbine Division which is not in an LSA. After bid opening and in response to the Corps' intended application of the 6-percent differential, Allis-Chalmers sent a telex to the Corps asserting that over 50 percent of the contract costs would be incurred in LSA's and, therefore, the 12-percent differential should be applied.

The Section and Hitachi argue that permitting Allis-Chalmers to qualify for LSA status with information submitted after bid opening would amount to improper acceptance of a late bid modification. We have held, however, that when the IFB does not contain a provision which elicits sufficient information to determine whether a bidder qualifies for an LSA preference, the bidder may submit information after bid opening to establish its LSA status. See, e.g., B-148720, May 7, 1962; 41 Comp. Gen. 160 (1961).

FPR § 1-1.801 provides that an LSA concern is one which, together with its first-tier subcontractors, will incur costs exceeding 50 percent of the contract price in LSA's. As we held in 41 Comp. Gen. 160, 164-5, the "place of manufacture" is not sufficient information to resolve the question of whether costs exceeding 50 percent of the contract price will be incurred in LSA's. Therefore, information submitted by Allis-Chalmers after bid opening should be considered in determining whether the 6-percent or 12-percent differential should be applied.


Deputy Comptroller General
of the United States