



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

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B-179029

October 23, 1973

Westinghouse Electric Corporation
1801 K Street, NW,
Washington, D.C. 20005

Attention: John L. Howland, Esq.

Gentlemen:

Your letters of June 26 and July 10, 1973, protest award of a contract to any other bidder under solicitation No. 3375, issued by Bonneville Power Administration (BPA), Department of the Interior, on April 30, 1973, for a requirement of 500 kV power circuit breakers, with associated spare parts and installation engineering services.

You maintain that BPA improperly excluded the cost of travel for the installation engineer when it computed the Buy American Act (41 U.S.C. 101-10c) evaluating differential for the foreign bid of Brown Boveri Corporation, thereby making Brown Boveri the lowest bidder. We must agree with BPA's evaluation for the reasons set forth below.

The requirement, deliverable on an F.O.B. destination basis to four electric power substation sites and one warehouse, was set forth in five groups in the solicitation, as pertinent:

ITEM NO. & (Code No.)	SUPPLIES/SERVICES	***	UNIT PRICE	AMT/DT
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GROUP I

1. (20- 7930)	Power Circuit Breaker, 500 kV, ***			
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1a.	INSTALLATION ENGINEER for Item 1 in accordance with the Section entitled Supervision of Installation of Supplementary Provisions (if required).			
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1b.	TRAVEL FOR INSTALLATION ENGINEER ***			
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PUBLISHED DECISION
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GROUP V

5. SHARE PARTS SET; * * *

TOTAL of Above Items, GROUPS I thru V, * * * Including Sub-Items a and b of each Group"

As an alternate to bidding on a group basis, the solicitation permitted bidders to offer lump-sum bids for two or more complete groups, excluding group IV for which bidders were to offer a separate lump-sum bid, and with respect to award on a lump-sum basis, provided:

"LUMP-SUM OFFERS, * * * the amount to be paid for any item shall bear the same ratio to the lump-sum offer that the price offered for such item bears to the sum of the prices offered for the items comprising the lump-sum offer."

Brown Boveri and four other companies submitted bids by bid opening on June 5, 1973. Brown Boveri's bid on groups I thru IV stated that no charge would be made for the installation engineer's services, but that \$600 would be charged for travel of the engineer; the corporation also submitted lump-sum bids (groups I, II, III, and V--\$1,236,400; group IV--\$196,400). Westinghouse's bid on groups I thru IV stated that the price of the installation engineer's services and travel was included, except for the engineer's travel under group II for which no charge would be made. Westinghouse did not submit a lump-sum bid.

BPA subsequently determined that Brown Boveri's lump-sum foreign bid was low after multiplying the Buy-American differential factor (12 percent) by the lump-sum total bid, less prorated travel costs of the installation engineer, adding the resultant differential to the total, and adding bond premium and foreign inspection costs for an evaluated total of \$1,622,240.65; your evaluated total on a group basis was second low at \$1,622,245.25. On the other hand, if the Buy-American factor had been applied to all of Brown Boveri's lump-sum bid without excluding prorated travel costs, Westinghouse would be low.

BPA's Chief of Materials and Procurement explains the decision to exclude prorated travel costs from Brown Boveri's lump-sum bid and the mathematical steps used in determining the Buy-American differential, as follows:

"* * * The cost of travel for the installation engineer was removed from the lump sum bid of Brown Boveri prior to application of the Buy American Act differential in accordance with

Section 14-6.104-4(f) of the Interior Procurement Regulations (IPR) * * *. Those travel costs were removed on a prorated basis as provided in the paragraph titled Lump-Sum Offers * * *.

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"Step 1 - Prorate travel"

* * * * *

$$\frac{1,432,800}{1,439,800} \left[\frac{\text{Brown Boveri's total lump-sum bid}}{\text{Brown Boveri's total bid for groups I-V}} \right] = 0.9951382 \left[\text{prorate factor} \right]$$

$$\text{TRAVEL X PRORATE [factor]} = * * * 2400 \left[\begin{array}{l} \text{sum of all travel costs} \\ \text{for Brown Boveri's} \\ \text{installation engineer} \\ \text{for groups I-IV} \end{array} \right]$$

$$\times 0.9951382 = \$2,388.33 \left[\text{prorated travel costs} \right]$$

"Step 2 - Foreign Component Computation"

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$$* * * \left[\frac{1,432,800}{1,439,800} \right] \left[\frac{\text{Brown Boveri's total lump-sum bid}}{\text{Brown Boveri's total bid for groups I-V}} \right] = (2388.33) \times 0.12 * * * \left[\frac{\text{Buy-American factor}}{\text{Buy American differential}} \right] = \$171,649.40$$

Section 14-6.104-4(f) of the Interior Procurement Regulations, cited by BIA, as authority for excluding travel costs from the Buy American differential computation, provides:

"(f) Executive Order No. 10502, as amended, provides that computation of differentials should be based upon the cost of foreign supplies or materials delivered at destination, and that additional costs involved in installation or other services to be performed after delivery should be excluded from the differential computation."

BIA further advises that the regulation follows our decision, B-145769, August 3, 1961, to the Secretary of the Interior when we said:

"* * * We are inclined to the view that under the provisions of the Buy American Act, as implemented by Executive Order No. 10502 and IPR 1-6.2, computation of the differential should be based upon the cost of the

foreign supplies or materials delivered at destination, and that additional costs involved in installation or other services to be performed after delivery should be excluded from the computation.

"When, as in this instance, the contract for which bids are invited includes both supply and construction elements, it would appear to be desirable to separate these elements, so far as practicable, not only for application of the Buy American requirements but also to furnish a more precise basis for determination of the applicability of pertinent labor laws and other requirements which are not equally applicable to the procurement of supplies and of construction work. * * *

DFA states that the cost of the engineer's travel was properly excluded from the Buy American computation under the Interior procurement regulation since the engineer's work relates entirely to post-delivery services, as exemplified by paragraph 2-21.1 of the Supplementary Provisions of the IFB, which provides:

"The Government may require the contractor to furnish one or more installation engineers * * * to supervise and be directly responsible for the installation and operation of the apparatus until tests are completed, the equipment is energized, and final acceptance is made."

On the contrary, you argue that some of the engineer's services which Westinghouse provides are performed before delivery, such as achieving delivery and arranging transportation from railhead to destination site; that other post-delivery services such as the engineer's duty to find, detect, and correct defective parts, after delivery of the circuit breakers, relate to continuing quality assurance procedures for the items; and that the Buy American factor should therefore apply to these costs.

We agree with DFA's view that the engineer's services as described in the Supplementary Provisions of the IFB are to be performed after delivery of the items at the F.O.B. destination sites. Although Westinghouse requires its installation engineer to perform predelivery services apart from the requirements of the IFB, bidders were only requested to price post-delivery services of the installation engineer. Further, we agree with DFA's statement that the primary job of the engineer under the IFB work description is to supervise the installation of the circuit breakers rather than to perform quality assurance procedures which, under the terms of the IFB, are to be performed in the factory.

Next, you urge that exclusion of the engineer's travel costs is contrary to the provisions of Executive Order No. 10582, December 17, 1954, as amended by Executive Order No. 11051, September 27, 1962, and Federal Procurement Regulations (FPR) 1-6.1 concerning the Buy American differential; alternatively, you argue that there is no indication in the Executive Orders or the regulations that these costs should be excluded. We disagree. Pertinent provisions from the Executive Orders and the FPR are quoted, as follows:

Executive Order No. 10582, as amended.

"Section 1.

"* * * (c) the term 'bid or offered price of materials of foreign origin' means the bid or offered price of such materials delivered at the place specified in the invitation to bid * * *, (Emphasis supplied.)

"Section 2(b) * * * 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 * * *.

"(c) The executive agency * * * shall * * * determine the amount of the differential * * * on the basis of one of the following described formulas * * *:

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

FPR 1-6.101

"(g) 'Foreign bid' means a bid or offered price for a foreign end product including transportation to destination * * *." (Emphasis supplied.)

FPR 1-6.101-1(b)

"* * * 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 * * * 12 percent factor shall be used * * * if the firm submitting the low acceptable domestic bid is a * * * labor surplus area concern."

We read the above provisions as requiring application of the Buy American factor to the price of foreign materials delivered to destination. Thus, the price of services rendered after delivery is properly excluded, in our view, from the "foreign bid" to which the factor is applied.

You also argue that the services of the engineer and his travel costs must necessarily be considered components of the delivered circuit breakers and subject to the Buy American factor. Components, as defined in FPR 1-6.101(b), mean 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.

This view does not preclude a bidder from including some or all of the required engineering services in the price of delivered circuit breakers. Notwithstanding instructions in a prior BPA solicitation for circuit breakers, which were similar to instructions in the present solicitation, directing bidders to quote unit prices for engineering services, we have considered a bidder's insertion of an "included" price for these subitems as complying with the instructions. 52 Comp. Gen. 255 (1972). Consequently, Brown Boveri's decision to bid "no charge" for engineering service costs in the subject procurement cannot operate, in itself, to make post-delivery engineering travel costs for which the corporation quoted lump-sum prices subject to the Buy American factor as you suggest. Rather, consistent with the relevant Executive Orders and procurement regulations, post-delivery services and travel costs must be excluded from the Buy American computation.

You also claim that BPA had no basis for extracting travel costs from Brown Boveri's lump-sum bid. The JTB provisions on lump-sum awards provided a formula for prorating engineering services and travel costs which would otherwise be indeterminable since they were included in the lump-sum bid. The formula scheme was a rational basis, in our view, for extracting engineering travel costs from Brown Boveri's lump-sum bid based on the prices the corporation quoted for engineering travel under its group bids. Since the travel costs were precisely determined and because the services were post-delivery, we believe BPA properly excluded them from the Buy American computation.

Finally, you urge that BPA has misapplied our 1961 decision, cited above. You state that the decision involved a situation where the cost of construction work to be done after delivery of the end items amounted to several hundred thousand dollars, unlike the case here, and special clauses, applicable only to construction contracts, were included in the solicitation for the work. You also point out that the solicitation in that decision required one lump-sum offer for the supply and the construction work, whereas here the engineering services are listed in separate subitems. Consequently, you suggest that BPA should not have relied on the decision as authority for excluding engineering travel costs here.

Although the present procurement does not require construction work amounting to several hundred thousand dollars, we believe our prior decision, reasonably read, was meant to exclude all post-delivery services from the Buy American computation whether or not they were related to a major construction effort. Further, the separate listing of post-delivery services in the subject solicitation directly conforms to our 1961 suggestion that these services be separately listed "so far as practicable" for application of the Buy American requirements and does not indicate that these services are different, for Buy American purposes, from the post-delivery construction services involved in our prior decision. Consequently, we believe BPA has correctly applied our decision in this procurement.

Your protest must therefore be denied.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
 of the United States