

GENERAL AGREEMENT ON

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TARIFFS AND TRADE

Special Distribution

Committee on Government Procurement

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UNITED STATES RESPONSE TO THE GOVERNMENT OF FINLAND ON THE QUESTION OF A NATIONAL SCIENCE FOUNDATION SERVICES CONTRACT

The delegation of the United States distributed the following statement (with attachments) at the Committee meeting held on 16 March 1989.

The Government of Finland has stated its concern that "the incorporation of the Buy American provision into relevant United States legislation did effectively result in de facto exclusion of foreign suppliers from a previous tender competition launched in 1987, and discontinued in 1988 at an advanced stage after the incorporation of the Buy American provision into the relevant legislation.

Consequently, the Government of Finland maintains that the compatibility of the application of the Buy American provision on the acquisition or lease concerned, with Article I.1(a) of the Agreement, should be examined in depth by the Committee."

Article I:1(a) states that the Code's obligations apply to procurements of products, whether purchased or leased, including incidental services but not "services contracts per se."

In responding to the inquiry made by the Government of Finland, the United States examined the following points, which it now wishes to put before the Committee:

1. What Happened?

1 April 1980

The National Science Foundation (NSF) awarded a contract to Antarctic Services, Inc. (ANS), a subsidiary of ITT. The contract is a multi-year contract which expires on 31 March 1990. This contract is a services contract (see point 2) for the operation of research programmes in the Antarctic.

September 1987

In performing its services contract for NSF, ANS requested proposals for a research vessel with icebreaking capacity.

August 1988

The appropriations legislation which funds NSF became law. It contained a Buy American provision for any use of the funds appropriated therein on the acquisition or lease of a research vessel with icebreaking capacity. This caused the procurement being conducted by Antarctic Services, Inc. to be cancelled.

31 January 1989

Antarctic Services, Inc. issued a new request for proposal for the lease and operation of a research vessel with icebreaking capacity.

2. Is the "contract concerned" covered by the Government Procurement Code?

No. The "contract concerned" is a sub-contract of a services contract awarded by NSF and therefore not covered by the Code.

ANS is procuring the lease and operation of a research vessel with icebreaking capacity for use in performance of its contract with NSF. ANS is a private firm not covered by the Government Procurement Code.

However, ANS is under contract to NSF, an entity which is covered by the Code. We therefore examined not only the "contract concerned" but also the contract awarded by NSF to ANS in order to make a full and complete report to the Committee.

(a) The Prime Contract:

The contract awarded by NSF to ANS is for operating, maintenance, and support services of the U.S. Antarctic Program (USAP). The contract includes the operation of a station in the Antarctic Peninsula and a station at the South Pole, the operation of laboratories, the design and construction of facilities, provision of a significant part of the operations and maintenance of a third station, arrangements for transportation and travel of USAP personnel, field party support services, and project management services. The contractor also sub-contracts for research vessels and small aircraft services.

The annual amount of this contract has been calculated at \$36-40 million. The value of the contract concerned when awarded, will be less than 50 per cent of this value.

ITT/ANS was awarded this contract in 1980.

(b) The sub-contract:

One of the tasks which ANS performs under the contract from NSF is the operation of research vessels. In this regard, ANS solicited proposals "toward securing a charter with options to buy a Research Vessel with

Icebreaking Capacity to operate in and around the waters of the Antarctic and the Southern Oceans" (as stated in the solicitation). This charter is an additional vessel to be used in carrying out the "scientific research requirements of the United States Antarctic Program."

Bidders for ANS's contract were to propose daily rates assuming full year operations for the vessel in each of the following two manners:

- (i) Six year time charter, with two options to extend the life of the charter by two years for each extension. Included in this configuration must be a fixed price option to buy the vessel at any time during the term of the charter and its extension if those options are exercised.
- (ii) Time charter with purchase price fixed at six years, eight years, and ten years. Vessel will be sold to ANS at the conclusion of the charter, the conclusion being six, eight or ten years"

3. How does the Buy America provision affect this sub-contract?

The Buy America provision was contained in NSF's appropriations' legislation for 1988 and expires 1 October 1989. It provides that no funds appropriated by that legislation shall be used for "the acquisition or lease of a research vessel with icebreaking capability."

The Federal Acquisition Regulations define "acquisition" in Part 2.101 as follows:

"Acquisition" means the acquiring by contract with appropriated funds of supplies of services (including construction) by and for use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated or evaluated. ..."

This restriction has thus affected the lease of the research vessel concerned through the services contract awarded by NSF to Antarctic Services, Inc.

4. Was the procurement restructured in order to avoid the obligations of the Code?

No. The services contract awarded by NSF to Antarctic Services was first awarded in 1980. This contract remains in effect today and has never been redone, cancelled, or re-issued.

A request for proposals was first issued by Antarctic Service, Inc. in September 1987. After passage of NSF's appropriations legislation, that procurement process was cancelled, and a new request for proposals was issued in January 1989. The cover letters for each of these requests are attached, revealing identical structures.

5. Was Antarctic Services merely acting as an agent of NSF?

No. The General Accounting Office ruled on this question in connection with a protest brought on another issue in May 1988, before the Buy America restriction was enacted in August of 1988. In this case, if GAO had ruled that Antarctic Services was acting as NSF's agent, the ruling would have re-instated two United States bidders which had been previously eliminated from the competition. However, the GAO ruled against the United States bidders, declaring that Antarctic Services was not acting as an agent of NSF.

Conclusion

The United States opposes all buy national restrictions whether for goods or services. Buy America legislation was passed in 1988 with the express intent of affecting the contract concerned. Regrettably, services contracts are not yet covered by the Government Procurement Code and are specifically excluded by Article I:1(a).

The United States cannot agree, therefore, with the position of the Government of Finland that the contract concerned should be subject to the obligations of the Code.



ITT Antarctic Services, Inc.

*621 Industrial Avenue
Paramus, New Jersey 07652
Telephone: (201) 967-0123 Telex: 134458*

1 September 1987

**Subject: Request for Proposal No. 778-052
Research Vessel with Icebreaking Capability**

Gentlemen:

ITT Antarctic Services Inc. (ANS) has a contract from the National Science Foundation (NSF) for the operating, maintenance and support services of the U.S. facilities in Antarctica. One of the tasks that ANS performs is the operation of research vessels. In this regard it is seeking a research vessel with icebreaking capability. Therefore, may we request your quotation in sextuplicate (6) copies for the charter with option to purchase such a vessel. The following attachments describe this requirement and provide bidders with the information on which their proposal is to be made.

1. General Requirements/Instructions to Bidders
2. General Background Information
3. Technical Requirements
4. Sample Subcontract with General and Special Provisions
5. Antarctic Conservation Act of 1978

Quotations are to be forwarded to the writer at the address shown above and are requested no later than 9 November 1987. Quotations are to be valid through 30 June 1988.

In the event you should have questions or be in need of any clarification regarding this request, please direct such to the writer at 201-967-2228.

Very truly yours,

ITT ANTARCTIC SERVICES, INC.

/sc
(WP-2485h)



ITT Antarctic Services, Inc.
621 Industrial Avenue
Paramus, New Jersey 07652
Telephone: (201) 967-0123 Telex: 134458

31 January 1989

Subject: Request for Proposal No. 779-225
Research Vessel with Icebreaking Capability

Gentlemen:

ITT Antarctic Services, Inc. (Charterer) has a contract from the National Science Foundation (Foundation) (DPP80-03801) for the operating, maintenance and support services of the U.S. facilities in Antarctica. One of the tasks that the Charterer performs is the operation of research vessels. In this regard, the Charterer is seeking a research vessel with icebreaking capability. Therefore, may we request your quotation in sextuplicate (6) copies for a ten (10) year charter with option to purchase such a vessel. The following attachments describe this requirement and provide you with the information on which your proposal is to be based.

1. General Requirements/Instructions to Bidders
2. General Background Information
3. Proposed Vessel Construction and Chartering Contract Terms and Conditions consisting of:
 - a) Cover Pages
 - b) General Provisions
 - c) Special Provisions - Construction
 - d) Special Provisions - Charter
4. Technical Requirements - Attachment A
5. Model Test and Ship Trials Criteria - Attachment C
6. Antarctic Conservation Act of 1978
7. Antarctic Treaty (complete text)
8. Agreed Measures for the Conservation of Antarctic Fauna and Flora

Thank you for your interest in this procurement.

Very truly yours,

ITT ANTARCTIC SERVICES, INC.

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