

DOCUMENT RESUME

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[Protests against Allegedly Restrictive Specifications].
E-188259; B-189039. September 26, 1977. 7 pp. + enclosure (1
pp.).

Decision re: Dresser Industries, Inc.: Galion Mfg. Div.; by
Robert F. Keller, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government
(876).

Organization Concerned: Bureau of Indian Affairs.
Authority: 4 C.F.R. 20.2(b)(1). 38 Comp. Gen. 190. 55 Comp. Gen.
1362. 55 Comp. Gen. 1. B-188393 (1977). E-189322 (1977).
B-179723 (1974). B-188416 (1976). B-180586 (1975). B-180608
(1975). E-179762 (1974). B-178718 (1974).

The protester objected to the specifications in several solicitations for bids. The protests alleging unduly restrictive specifications were untimely in those cases in which the protests were filed after bid opening. The preparation and establishment of specifications to reflect the minimum needs of the Government were matters primarily within the jurisdiction of the procuring agency. The record indicated that the agency needs could best be met by use of the specified articles; therefore, the use of such specifications was reasonable. (Author/SC)

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DECISION

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

FILE: B-188259, B-189039

DATE: September 26, 1977

MATTER OF: Galion Manufacturing Division of Dresser Industries, Inc.

DIGEST:

1. Protest alleging unduly restrictive specifications is untimely where basis for protest was apparent from invitation for bids but protest was not filed until after bid opening.
2. While protest regarding two solicitations canceled by procuring agency is moot and not for consideration by this Office, protest regarding two other canceled solicitations will be considered since procuring activity has advised GAO that cancellation of these two solicitations was due to circumstances unrelated to grounds of protest and that any revised solicitation will contain protested specifications.
3. Preparation and establishment of specifications to reflect minimum needs of Government are matters primarily within jurisdiction of procuring agency, subject to question by GAO only when not supported by substantial evidence.
4. While protester has asserted that specification limiting motorized graders to articulated frame type was improper, record indicates that agency needs could best be met by use of articulated frame graders. Consequently, use of such specifications was reasonable and will not be objected to by GAO.

Galion Manufacturing Division of Dresser Industries, Inc. (Galion) has protested to our Office in connection with the following solicitations: BIA-MOO-76-2829 (-2829); BIA-MOO-76-3058 (-3058); FAC-KOI-77-3181 (-3181); 3003 (-3003); N00-600-7106 (-7106); and FAO-KOI-77-3193 (-3193), all issued by the Bureau of Indian Affairs (BLA), United States Department of the Interior (Interior); and request for proposals (RFP) FYPL-T3-B0978-N-12-10-76

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(-B0978), issued for BIA by the General Services Administration (GSA). For the reasons stated below consideration will only be given to Galion's protests under solicitations -B0978, -2829, and -3058.

Galion's protests against Solicitations -3003 and -3193 are untimely. With respect to Solicitation -3003 Galion argues in essence that the BIA Phoenix Office requirement for three Type II, Size 7 motorized graders as per Federal Specification 00-G-630E is overly restrictive and, in effect, a sole source procurement. In connection with Solicitation -3193, Galion has raised a similar argument: that the requirement for one motorized grader, Type II, Size 5, in accordance with the same Federal Specification is too restrictive and that the issuing activity, BIA's Albuquerque Office, acted improperly in issuing this type of specification. Galion's protest against Solicitations -3003 and -3193 were received at our Office January 27, 1977, and May 10, 1977, respectively. Bids on Solicitation -3003 were opened January 19, 1977 while the opening under -3193 took place on April 19, 1977.

Section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. Part 20 (1976), provides that protests based upon alleged improprieties in a solicitation which are apparent prior to the opening of bids shall be filed prior to bid opening. Since Galion's protests against the use of allegedly restrictive specifications in each of these two procurements was not made prior to bid opening the protests are untimely and will not now be considered on the merits. Inter Royal Corporation, B-188393, March 3, 1977, 77-1 CPD 160.

Four of the solicitations under protest have been canceled. Solicitation -7106, issued by BIA's Gallup, New Mexico Office and seeking bids on two Type I or III, Size 7 motorized graders in accordance with Federal Specification 00-G-630E, was canceled on January 18, 1977, following a determination by the issuing activity that the minimum weight requirement of 38,000 pounds per grader was restrictive of competition. Solicitations -2829 and -3058, as amended, both issued by BIA's Albuquerque, New Mexico Office, and both seeking a Type II, Size 4 motorized grader in accordance with Federal Specification 00-G-630E, was likewise canceled by the issuing activity following its finding that an amendment to the specifications had the effect of causing an ambiguity. Finally, Solicitation -3181 issued by BIA's Albuquerque, New Mexico Field Administrative Office and seeking a Type I, Size 6 motorized grader, was canceled by that issuing activity on

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February 7, 1977, following a determination that outdated specifications had been used.

Interior has indicated to our Office that cancellation of these four procurements renders Galion's protest under these solicitations moot. However, we are in agreement with Interior in this regard only with respect to Solicitations -7106 and -3181. Young Engineering Systems, B-189322, July 11, 1977, 77-2 CPD 15. Insofar as Solicitations -2829 and -3058 are concerned we have been specifically advised by BIA's Albuquerque Office that its cancellation of these two solicitations was unrelated to the subject protest and that any revised solicitations will contain specifications against which Galion's protest was lodged. In these circumstances we believe it appropriate to consider Galion's protests in connection with Solicitations -2829 and -3058, notwithstanding that these solicitations have been canceled. Accordingly, consideration will be given to Galion's protests under Solicitations -B0978, -2829, and -3058.

As has already been noted, Solicitations -2829 and -3058, as amended, each were issued by BIA's Albuquerque Office, and sought Type II, Size 4 motorized graders in accordance with Federal Specification 00-G-630E. RFP -B0978, as amended, sought offers for two Type II, Size 6 motorized graders in accordance with Federal Specification 00-G-630E and certain other minimum requirements as set out in the solicitation. Three offers were received in response to RFP -B0978 prior to the December 17, 1976 closing date for receipt of proposals. On January 4, 1977 award was made to Galion, the low offeror. Thereafter, GSA was advised by a competitor of the protester that Galion could not manufacture the motorized grader in accordance with the requisite specifications. Upon further inquiry GSA discovered that a letter accompanying Galion's December 13, 1976 offer had been inadvertently left in the envelope. In this letter, Galion pointed out that its Model T 600B would meet or exceed all specifications except the requirement for an articulated frame. Since Galion could not meet the specifications, on January 13, 1977, GSA issued a modification canceling the subject contract as in the best interest of the Government. On January 27, 1977 Galion's protest was timely received at our Office. Thereafter, on March 18, 1977, a resolicitation was undertaken by GSA and award was made to Caterpillar Tractor Company on May 9, 1977.

With regard to the decision to make award immediately to Caterpillar we note that award followed a May 6, 1977 determination that award must be made without delay. We have stated that our Office will not question the administrative determination of urgency

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of a procurement unless the contracting officer's determination of urgency was unreasonable or justified. Cal-Chem Cleaning Company, Incorporated, B-179723, March 12, 1974, 74-ICPD 127. The instant determination was not unreasonable as a prompt award was necessary to meet scheduled construction goals.

Although Galion has argued that several of these solicitations' specification requirements are unnecessary or unduly restrictive, the protester recognizes that its principal objection is to the requirement--contained in all these procurements--that the motor grader be "Type II", that is, have an articulated frame.

Articulated frame motor graders have a joint in the middle which pivots to a limited degree. This permits the machine to be operated in a different manner than motor graders with rigid frames. Since Galion does not presently manufacture an articulated frame motor grader, any solicitation which is limited to "Type II" machines restricts competition to the extent that Galion, at least, is precluded from bidding.

Galion argues that the manufacturers of articulated frame machines have through their promotional claims created a demand for that type of unit out of all proportion to its true utility, and that the operating modes which are unique to articulated frame machines will be used only a small percentage of the time the machine is being used. Galion contends that the Government's needs represented by these solicitations can, therefore, be met by Type I (rigid frame) as well as by Type II (articulated frame) machines and that the solicitations are unduly restrictive of competition insofar as they preclude offers of Type I machines.

We note that Federal Specification 00-G-630E was issued by the Federal Supply Service of GSA on August 31, 1976, superseding an earlier specification covering the use of motorized graders by Federal agencies. Federal Specification 00-G-630E designated four types of motorized graders and, in paragraph 3.3.4, classified the Type II motorized grader as follows:

"Type II. Type II graders shall be of the 6-wheel, 4-wheel drive, front wheel steer, articulated frame type. The final drive shall be on the four rear wheels, arranged in tandem, two on each side. The tandem frames shall be mounted on, and pivot about, the driving

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axle so that equal weight is carried on all four wheels operating over rough terrain to minimize effect on the evenness of the blade cut. A lock-unlock drive train differential shall be provided."

As pointed out by the protester, the articulated frame--the essential difference between the Type II and the Type I graders--greatly reduces the turning radius of motorized graders. Moreover, information in the record before us shows that articulated frame steering permits a variety of steering techniques, thus providing increased maneuverability and versatility and allowing for a wider stance for extra stability on slopes.

The determination of the needs of the Government and the methods of accommodating such needs is primarily the responsibility of the contracting agencies of the Government. 38 Comp. Gen. 190 (1958); Johnson Controls, Inc., B-188416, January 2, 1976, 76-1 CPD 4; Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181. We recognize that Government procurement officials, who are familiar with the conditions under which supplies, equipment or services have been used in the past, and how they are to be used in the future, are generally in the best position to know the Government's actual needs, and, therefore, are best able to draft appropriate specifications. Manufacturing Data Systems, Inc., B-180586, B-180608, January 6, 1975, 75-1 CPD 6. Consequently, we will not question an agency's determination of what its actual minimum needs are unless there is a clear showing that the determination has no reasonable basis. Manufacturing Data Systems, Inc., supra. In this connection we note also that the question of whether an existing Federal Specification will meet the actual needs of an agency will likewise not be questioned by our Office unless such determination can be shown to have no reasonable basis. D. Moody & Co., Inc.; Astronautics Corporation of America, 55 Comp. Gen. 1 (1975), 75-2 CPD 1.

With respect to Solicitation -B0978 the record indicates that the Type II, Size 6 motorized graders are to be used on the construction, improvement, and maintenance of Indian reservation roads located in the rugged coastal mountain range of northern California. Included among the tasks to be performed by these graders are the reshaping and rebuilding of shoulders, pulling ditches, bank sloping and blading work in all types of earthen materials from light soils to rock formations. The terrain over which these tasks are to be performed are of relatively low-standard construction, having steep back and shoulder slopes, and long sustained grades in excess of 6 percent and up to 18 percent.

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Moreover, the record states that roads to be utilized in this project are of a single lane contour type with many sharp curves and switch backs which make maneuverability and short turning radius important characteristics in equipment needed for these tasks.

In connection with Solicitations -2829 and -3058, Interior has indicated that the work to be performed justifies use of the articulated grader. Specifically, Interior states, in part, the following with respect to Solicitation -2829:

"The major feature of the Articulated Motor Grader is the new articulated frame which makes for excellent maneuverability and a short turning radius. The work involved within the Eight Northern Pueblos is very difficult since streets and mountain roads are very narrow and are usually of a one lane nature and turning of present machinery with the rigid frame is difficult. The articulated grader also has a new feature termed the "crab position." This enables the grader to maintain back wheels on dry ground while having the front wheels in the bar ditch cleaning out the mud and debris."

Essentially the same statement was made by Interior with regard to Solicitation -3058, which sought equipment for use on the Ramah Navajo reservation.

We cannot subscribe to Galion's contention that Federal Specification 00-G-630E has been improperly used in each of these three solicitations. It is axiomatic that the Government may obtain equipment upgrading the state-of-the-art where the need exists. Particle Data, Inc., B-179762, B-178718, May 15, 1974, 74-1 CPD 257. Moreover, as noted in Particle Data, Inc., *supra*, this is so even though similar equipment generally equivalent from a performance standpoint is commercially available. See Maremont Corporation, 55 Comp. Gen., *supra*. In our opinion, definite advantages, in terms of operational ease and performance capability make the Government's specification of the articulated frame motorized grader to be not only preferred, but reasonable requirements in the circumstances.

Accordingly, we conclude that award made under Solicitation -B0978 was proper, and that Solicitations -2829 and -3058 as revised may specify a Type II, Size 4 motorized grader in accordance with

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Federal Specification 00-G-650E. Therefore, Galion's protest against these solicitations is denied.

R. F. Kistler
Acting Comptroller General
of the United States



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

Paul Sherry
P.L. II

IN REPLY
REFER TO

B-188259
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September 26, 1977

The Honorable Howard M. Metzenbaum
United States Senate

Dear Senator Metzenbaum:

We refer to your interest in the protest of Gallion Manufacturing Division of Dresser Industries under the following solicitations: BIA-M00-76-2829; BIA-M00-76-3058; FA0-K01-77-3181; 3003; N00-600-7106; and FA0-K01-77-3193, all issued by the Bureau of Indian Affairs, United States Department of the Interior; and request for proposals FYPL-T3-B0978-N-12-10-76, issued for the Bureau of Indian Affairs by the General Services Administration.

Enclosed is a copy of our decision of today, denying the protest.

Sincerely yours,

Robert M. ...
Acting Comptroller General
of the United States

Enclosure