

Golden

**DECISION**



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

25669

**FILE:** B-210843

**DATE:** July 6, 1983

**MATTER OF:** Urdan Industries, Ltd.

**DIGEST:**

1. Protest against specialty metals clause in invitation for bids is dismissed as untimely since it was filed after bid opening.
2. Bid to supply product (component of a weapon or weapons system) made of foreign specialty metal was properly rejected for not complying with the preference for domestic specialty metals clause in the solicitation where clause is based on law which agency reasonably interprets as permitting exception to clause for weapon or weapons system, not components thereof.

Urdan Industries, Ltd. (Urdan), protests the rejection of its low bid as nonresponsive by the Department of the Army (Army) under invitation for bids (IFB) No. DAAE07-82-B-8572, for air inlet shields, a part used on the M88A1 military vehicle.

The specialty metals clause, Defense Acquisition Regulation (DAR) § 7-104.93(a) (1976 ed.), was included in this IFB. Under this clause, the contractor agrees that any specialty metals incorporated in articles delivered under the contract will be melted in the United States. However, paragraph (d) of this clause also provides that:

"Nothing in this provision shall preclude the procurement of foreign produced specialty metals used in the production or manufacture of weapons or weapons systems made outside the U.S. \* \* \* if such procurement is necessary to comply with agreements with foreign governments."

Urdan certified that its product was 100-percent foreign content. The Army asserts that since this procurement is for a component rather than a complete weapon or weapons system it is not within the paragraph

026085

(d) exception for foreign-produced specialty metals. Therefore, Urdan was determined nonresponsive because it offered a product with foreign specialty metals. Award was made to BMY, Division of Harsco Corporation, the second low bidder.

Urdan contends that paragraph (d), added to the specialty metals clause to implement the Continuing Appropriations For Fiscal Year 1983, Pub. L. 97-276 § 101(c), 96 Stat. 1187 (1982), for the Department of Defense (DOD), also permits the procurement of parts or components of weapons or weapons systems containing foreign specialty metals. Urdan argues that the legislative history is unclear concerning congressional intent and relies upon general rules of interpretation. Urdan also questions whether the clause was properly used in this IFB because the clause allegedly was not applicable to the funds used for this procurement.

The protest is dismissed in part and denied in part.

Urdan's contention that the DAR clause was not required to be incorporated into the IFB relates to an impropriety apparent from the face of the IFB. Therefore, Urdan's failure to protest the IFB provision before bid opening bars consideration of that issue as untimely, 4 C.F.R. § 21(b)(1) (1983).

With respect to the rejection of Urdan's bid, the primary support for the Army's position that "weapons or weapons systems" does not cover parts and components is the record of the United States Senate on December 18, 1982. Senator Tower proposed amendment 1517 to the Continuing Appropriations For Fiscal Year 1983, Pub. L. 97-377 § 723, 96 Stat. 1854 (1983). This amendment would have changed the language of Pub. L. 97-276, which referred to "weapons or weapons systems," to "parts or components of defense items."

In the discussion concerning this amendment, Senator Tower stated:

"The language in § 2951 allows DOD to purchase only 'weapons or weapons systems' manufactured outside the United States and containing specialty metals of non-U.S. origin. However, the United States does not buy weapons or weapons systems from overseas. For the most

part, we purchase foreign made components, sub-assemblies, and defense equipment from our European allies. Under the provision of § 2951, DOD would be prohibited from buying such items.

"The amendment we propose will allow DOD to purchase defense items, and parts and components of defense items which are manufactured outside the United States." (Emphasis added.)

The amendment was not adopted, and the final legislation was passed with essentially the identical language contained in the predecessor legislation, Pub. L. 97-276, which contained the "weapons or weapons systems" language.

The Army concludes that this reflects the congressional intent and understanding with respect to the meaning of the words "weapons or weapons systems" as not including components and parts of defense items. The Army further asserts that if such parts or components of defense items were deemed to be part of the definition of "weapons or weapons systems," there would have been no need for Senator Tower's proposed amendment.

The Army also notes that the Senate Report, No. 97-580, 97th Cong., 2nd. Sess. 148 (1982), to the DOD Appropriation Bill, 1983, S. 2951, indicates that the general specialty metals restriction was intended to restore protection for domestic industry that had been removed in previous appropriation acts. The report also states that, "The new exception to the Buy American provisions of the bill permits purchases of foreign specialty metals when used in foreign manufactured weapons systems."

Other than to argue that we should not rely on the Senate proceedings since it is primarily the opinion of one legislator, Urdan offers no legislative history that contradicts the Army's interpretation of the law. In the absence of any contrary indications in more authoritative portions of legislative history such as committee reports, we conclude that Senator Tower's statement, on behalf of nine cosponsors, showed that the proposed amendment was necessary to purchase components of defense equipment containing specialty metals of foreign origin and it was not suggested that the existing language already accomplished this purpose. Under these circumstances, we concur with the Army's position that the exception permitting foreign

content purchases does not extend to components and parts. See Applicability of Depository Library Act to National Technical Information Service Publications, B-114829, June 27, 1975.

Urdan contends that Army Regulation 310-25 (more precisely Joint Chiefs of Staff (JCS) publication 1), a dictionary of military terms and a letter which Urdan asserts is the assessment of the Under Secretary of Defense for Research and Development of the specialty metals statutory restriction support the view that DOD officially agrees that weapons and weapons systems cover components and parts. However, as the Army points out, while JCS publication 1 defines weapons systems as "a weapon and those components required for its operation," it also advises parenthetically that "(the term is not precise unless specific parameters are established)" and, thus, does not, by itself, constitute a precise definition. Also, it is not clear that this definition would be binding on the Army in interpreting the DAR provision.

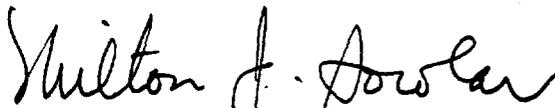
The DOD document which Urdan cites on its behalf, entitled "Assessment of FY83 'Specialty Metals' Appropriation Restriction," states, in essence, that DOD was uncertain as to the effect of the provision on the purchase of the components and parts, that a reasonable interpretation is that a provision allowing purchase of a weapons system abroad would also extend to its spare parts, but that DOD's general counsel should be asked to provide legal advice as to the proper interpretation of the specialty metals provision. This document does not appear to constitute a DOD policy statement and, in fact, refers the issue of the provision's meaning to the General Counsel. Thus, neither the Army regulation nor assessment document provides any evidence which would refute the reasonableness of the Army's position under this procurement.

Further, we are reluctant to question the Army's interpretation of the clause based on law since it is significantly responsible for enforcement of that law. See Colorado State University, B-194627, December 27, 1979, 79-2 CPD 438.

We therefore conclude that under this IFB, a bidder could not bid a product containing foreign specialty metals. Urdan's certification that its product represented 100-percent foreign content was contrary to the domestic

specialty metals clause and rendered Urdan's bid nonresponsive. See E. Miltenberg, Inc., B-207346, November 29, 1982, 82-2 CPD 479.

We deny the protest in part and dismiss the protest in part.

A handwritten signature in cursive script that reads "Milton J. Fowler".

Acting Comptroller General  
of the United States