

DECISION

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

*Spiegelberg
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FILE: B-210801.2

DATE: November 6, 1984

MATTER OF: Grieshaber Mfg. Company, Inc.

DIGEST:

1. Despite lengthy procurement delays, agency acted properly in amending RFP procuring specialty metal item to recognize exception to DOD restriction against use of foreign specialty metals where end products of qualifying countries are offered. Law had been amended to recognize this exception after RFP issuance, but RFP did not recognize this exception until RFP amendment was issued.
2. Although failure to promptly notify offeror of awards on other line items under RFP, where offeror was in line for award on another line item, violated Defense Acquisition Regulation § 3-508, such procedural deficiency does not provide basis for disturbing otherwise valid award since alleged prejudice is speculative.

Grieshaber Mfg. Company, Inc. (Grieshaber), has protested the issuance of amendment 0004 to request for proposals (RFP) DLA120-82-R-2227, issued by the Defense Personnel Support Center (DPSC), Defense Logistics Agency (DLA), Philadelphia, Pennsylvania, for various forceps. Grieshaber states that it was in line for award of line item 0006 of this RFP long prior to the issuance of this amendment, but DPSC told it that a lawsuit precluded an award. In this regard, the RFP was issued over 2 years ago and proposals were received in November 1982. Grieshaber claims that the issuance of this amendment is "equivalent to [an improper] cancellation and resolicitation of the procurement. Grieshaber also claims that because of its small business/labor surplus area status, this effective cancellation violates the policy favoring awards to small business and labor surplus area concerns. Grieshaber also claims that it was not notified of awards of certain other line items made long

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ago under this RFP. Grieshaber claims this lack of notification violated pertinent procurement regulations, prejudiced its interests, and demonstrates that award of line item 0006 should have been made to it prior to the issuance of amendment 0004.

We deny the protest.

The RFP was issued on August 9, 1982, as a 100-percent labor surplus set-aside for various line items of forceps. The RFP contained a clause--I-42 "Preference for Domestic Specialty Metals" (DLA 1982 Jan)--which effectively excluded items made from specialty metals not "melted" (the first production stage of the metals) in the United States. The forceps being procured under the RFP are made of specialty metals. The restriction on use of foreign specialty metals stems from a provision which has been enacted in various forms since 1972 in Department of Defense appropriation acts. See Department of Defense Appropriation Act, Pub. Law 92-570, § 724, 86 Stat. 1184 (Oct. 26, 1972).

Amendment 0001 to the RFP was issued August 27, 1982, adding certain line items to the RFP. By amendment 0002 dated October 7, 1982, the RFP changed clause "I-42" to the specialty metals clause contained in Defense Acquisition Regulation (DAR) § 7-104.93(b), reprinted in 32 C.F.R. pts. 1-39 (1983). The DAR clause exempts "qualifying country end products" from the foreign specialty metal exclusion. Amendment 0002 was occasioned by the Department of Defense Authorization Act of 1983, Pub. Law 97-252, § 1129, 96 Stat. 759 (Sept. 8, 1982), which made the "qualifying country" exception to the specialty metals exclusion. However, this exception to the specialty metals exclusion was subsequently revoked in a Joint Resolution, Pub. Law 97-276, § 101(a)(4), 96 Stat. 1188 (Oct. 2, 1982). Consequently, DPSC issued amendment 0003 on November 10, 1982, once again incorporating the "DLA 1982" version of clause "I-42" in the RFP. This amendment also extended the closing date for receipt of proposals to November 30, 1982, by which time a number of proposals were submitted.

DLA did not promptly make an award under the RFP. DLA attributes the delay in making this award to certain protests first filed at this Office in June 1982 by Columbia Surgical Manufacturing Corporation (Columbia) and A&P Surgical Company Inc. (A&P), against multiple DPSC solicitations. These protests concerned the DLA interpretation of

the specialty metal restrictions as to whether it required only the metal to be melted in the United States or whether the specialty metal item had to be completely manufactured in the United States. DLA believed the former definition was correct. On February 14, 1983, any award under this RFP was specifically protested. These protests were resolved in favor of DLA's interpretation in A&P Surgical Company Inc.; Columbia Surgical Instruments Co., Inc., 62 Comp. Gen. 256 (1983), 83-1 C.P.D. ¶ 263, and Columbia Surgical Manufacturing Corporation, B-209983, Mar. 28, 1983, 83-1 C.P.D. ¶ 316. However, on April 11, 1983, Columbia and A&P filed a lawsuit on the same basis in the United States District Court for the Eastern District of Pennsylvania against DLA solicitations involving specialty metals. The United States agreed at that time not to proceed with any awards on specialty metal solicitations pending a decision in the lawsuit. The lawsuit was finally resolved in a stipulation for voluntary dismissal on March 5, 1984.

Other line items were awarded under this RFP to another offeror on March 22, 1983, during the period following resolution of bid protests by this Office and the institution of the lawsuit. DPSC admits that it inadvertently failed to give notice to Grieshaber of the award of these items. DPSC states that no award could be made to Grieshaber during this period because the Food and Drug Administration (FDA) did not finally approve Grieshaber as a source until April 11, 1983, when the awards were suspended by the lawsuit.

The "qualifying country exception" to the specialty metals restriction was reinstated by the Supplemental Appropriations Act of 1983, Pub. Law 98-63, chap. 3, 97 Stat. 309 (July 30, 1983), and the 1984 Department of Defense Appropriation Act, Pub. Law 98-212, § 721A, 97 Stat. 1442 (Dec. 8, 1983). Consequently, DPSC issued amendment 0004 to the RFP on April 11, 1984, once again substituting the DAR § 7-104.93(b), supra, "I-42" specialty metals clause in place of the "DLA 1982" specialty metals clause. This amendment also redefined the delivery dates in view of the considerable delays in this procurement and extended the date for receipt of revised proposals to April 25, 1984.

Inasmuch as the Pub. Law 98-212 treatment of specialty metals recognizes the "qualifying country" exception and is the current restriction on Department of Defense procurements of specialty metal items, we believe DPSC issuance of amendment 0004 to the RFP was entirely appropriate. It also

was in accordance with applicable instructions of DLA and the DAR council which required awards of specialty metal items to be in accordance with currently applicable law. See DAR case 83-40, "Specialty Metals and Chemical Protective Clothing." It certainly did not constitute a cancellation of the RFP since the prices for these items have not been publicly disclosed. Grieshaber and all other offeror(s) were entitled to revise their price(s) on the forceps, given the awareness of the currently applicable specialty metal restrictions and the considerable passage of time since the last proposals were received. Neither the previous statements by DPSC to Grieshaber that it was the concern apparently in line for award of line item 0006 nor Grieshaber's small business and labor surplus area status should preclude DPSC from amending the RFP prior to award to advise offerors of the currently applicable legal provisions concerning specialty metals.

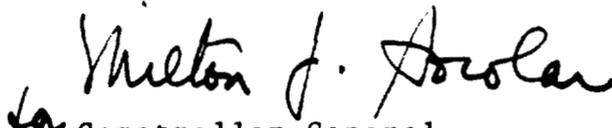
The agency has indicated that the reason that it failed to make an award to Grieshaber during the short period in early 1983 from our decision in A&P Surgical Company, Inc.; Columbia Surgical Instruments Co., Inc., 62 Comp. Gen., supra, and the initiation of the lawsuit was because it had to wait for FDA approval of Grieshaber. The approval did not come until after the lawsuit began. Grieshaber has presented no evidence that this was not the case. Consequently, the agency's award during this period to another company, which apparently had the requisite approval, was not objectionable.

The failure to notify Grieshaber of the other award under the RFP does violate DAR § 3-508.3, supra. However, such postaward notifications are procedural in nature and provide no basis for disturbing an otherwise valid award. Bell & Howell Corporation, B-196165 July 29, 1981, 81-2 C.P.D. ¶ 49. Indeed, Grieshaber does not complain about the other award. The prejudice claimed by Grieshaber is that it would have expeditiously availed itself of its remedies at the Small Business Administration and this Office to obtain an award of line item 0006 if it had been aware of the other awards under the RFP. Also, Grieshaber may have intervened in the lawsuit to make sure its award was not affected, since it was offering totally domestic specialty metals not in controversy in that lawsuit. This alleged prejudice is highly speculative as to how it could have resulted in an award to Grieshaber. Further, the argument that it would have taken these steps is not particularly convincing given the facts that Grieshaber submitted its last proposal revision in November 1982, admits that it was aware the lawsuit

was the reason it had not received an award of item 0006 during the pendency of the lawsuit, and did not file its protest with this Office until April 1984.

Finally, in its response to the administrative report, Greishaber cautions that the awards made under the RFP were probably for foreign products. Similar contentions were made in a protest of awards to the same supplier, to whom the award of the line items under this RFP were awarded, on another DPSC procurement for surgical instruments. Alan Scott Industries; Grieshaber Manufacturing Company, Inc., 63 Comp. Gen. _____, B-212703, Sept. 25, 1984, 84-2 C.P.D. ¶ 349, which denied the protest. In both that case and under this RFP, that supplier offered end products of a "participating country." See DAR § 6-001.5(c); supra. In Alan Scott Industries; Grieshaber Manufacturing Company, Inc., 63 Comp. Gen., supra, we found the RFP allowed "participating country" end products to be evaluated equally to domestic offers, with no evaluation preference added.

In view of the foregoing, Grieshaber's protest is denied.

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Comptroller General
of the United States