



The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

Matter of: Viereck Co.

File: B-222520

Date: August 5, 1986

## DIGEST

1. Where RFP for lathes neither required identification of the lathes proposed by offerors nor required any technical data and the sole evaluation criterion was price, agency properly accepted the low offer where the offeror did not take any exception to the solicitation's requirements. Although the awardee submitted an unsolicited brochure on a particular model lathe with its initial proposal (the model offered was not specified), the proposal indicated that the descriptive literature was not intended to qualify the offeror's obligation to meet the specifications.
2. Grounds for protest are dismissed as untimely where the bases for protest are initially presented almost 1 month after the protester should have known of the basis of the protest grounds as a result of information received under a Freedom of Information Act request.

## DECISION

Viereck Co. (Viereck) protests the award of a contract for variable speed 10-inch toolroom lathes to American Machine Tool Company (American) under request for proposals (RFP) No. F09603-85-R-1766 issued June 17, 1985, by Warner Robins Air Logistics Center, Robins Air Force Base, Georgia. Viereck contends that the lathes offered by American are technically unacceptable on the basis that they fail to comply with several of the specifications required by the solicitation. In addition, Viereck challenges the representation in American's offer that it is a manufacturer of the lathes and as such meets the requirements of the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45. Viereck also appears to be questioning American's certification that the lathes which it is providing are domestic end products under the Buy American Act, 41 U.S.C. §§ 10a-d.

Viereck's protest is dismissed in part and denied in part.

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## TIMELINESS OF VIERECK'S PROTEST

On March 6 Viereck filed a protest with the agency of the January 8 award to American based on its belief that the lathes offered by American failed to meet several of the specification requirements set forth in the solicitation. Specifically, Viereck asserted that the Feeler model FTL-618EM lathe, which it believed that American may have offered, did not meet the specification requirements for a spindle nose runout of .000025 TIR (total indicator reading), a combination English and metric gearbox and that all threaded parts be configured in the inch system. Viereck's protest was denied by the agency by letter dated March 31, 1986, on the basis that all correspondence in the contract file indicated that the lathes offered by American would be in complete compliance with the applicable specifications. Viereck advises that it received the agency's protest denial on April 9 and Viereck then filed the protest with our Office on April 21, within 10 working days of its receipt of the agency's determination on its protest.

The agency contends that Viereck's protest to our Office is untimely since the agency protest was first filed more than 10 working days after the basis of the protest was known. Where a protest is filed first with the contracting agency, a subsequent protest to our Office will be considered only if the initial protest was timely. 4 C.F.R. § 21.2(a)(3). The agency states that notice of the proposed award to American was mailed to the unsuccessful offerors on January 3 and that, accordingly, Viereck's protest which was filed with the agency on March 6 was untimely. In its protest to the agency Viereck stated, in part, that it had not been notified of the award to American until it received a copy of the February 20 edition of the Commerce Business Daily (CBD) which contained a notice of the award. This statement is consistent with the protester's advising us in the protest filed with our Office that it first received notice of the award to American on February 26 upon reading the award synopsis in the February 20 CBD.

While the agency has advised that it mailed a notice of the award to the unsuccessful offerors in January, it has not submitted any evidence which would establish that a notice of award was, in fact, mailed to and received by Viereck. We resolve doubts surrounding the date that a protester first became aware of the basis of protest in favor of the protester. See Builder's Security Hardware, Inc., B-213599.2, Feb. 15, 1984, 84-1 C.P.D. ¶ 207. Accordingly, we will consider the merits of Viereck's grounds for protest which were raised with the agency in the March 6 protest.

## MERITS OF THE PROTEST

The RFP provided in pertinent part that the lathes were to be in accordance with military specification MIL-L-80007C dated September 9, 1983, as amended.

The solicitation was issued to 24 potential offerors and offers were received from two companies--Viereck and American. The solicitation did not provide for the submission of technical proposals and the sole evaluation factor set forth in the solicitation was price. Furthermore, the solicitation did not require that offerors either identify the model lathe offered or that they provide any descriptive data on the lathes.<sup>1/</sup> The solicitation provided for the delivery of three lathes and a specified number of technical manuals thereon with an option to purchase up to nine additional lathes with additional technical manuals. The deadline for best and final offers was December 18 and Viereck's best and final offer for the base and option items resulted in a total evaluated price of \$487,097 and American's best and final offer was in the amount of \$292,305. In accordance with the solicitation's evaluation criterion award was made to American since it had submitted the lowest priced offer.

In its initial proposal dated August 1, American typed the notation "FOB: DESTINATION BROCHURE ENCLOSED" next to the "acceptance" point for the lathes which were to be supplied FOB origin. Also, on page 5 of the solicitation in the provision requesting "Guaranteed Maximum Shipping Weights and Dimensions" American inserted the handwritten notation "see brochure" on the line where offerors were to provide information on guaranteed shipping weights and dimensions. The brochure enclosed with American's initial proposal was on the Feeler toolroom lathe, model FTL-618EM manufactured by the "Feeler Machinery Ind. Co. Ltd. of Taiwan, R.O.C."

In its protest Viereck incorporates by reference the allegations which it made in its March 6 protest concerning the Feeler lathe's failure to comply with several of the specification requirements set forth in the solicitation. The first alleged shortcoming of the Feeler lathe is that the "spindle nose runout" required by the military specification for the type 1 lathe is .000025" TIR, whereas the Feeler lathe allegedly has a spindle nose runout of only .0001" TIR. The protester also points out that the ordering data referenced in the solicitation require a combination English and metric gearbox, whereas the Feeler lathe does not have such a combination gearbox. Finally, the protester states that both the ordering data and the military specification, as amended, require all threaded parts to be configured in inches, whereas many of the Feeler lathe's threaded parts are configured on a metric basis.

The agency asserts that there is nothing in American's offer which would indicate that American was offering a lathe which would not be in full compliance with the solicitation's specifications.

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<sup>1/</sup> The contracting officer advises that the solicitation was issued as a request for competitive proposals rather than as an invitation for sealed bids since there was no reasonable expectation that more than one sealed bid would be received. See Federal Acquisition Regulation, 48 C.F.R. § 6.401(a)(4). We are advised that on the previous procurement of lathes, although the agency solicited 30 sources, only Viereck submitted a bid.

We do not agree with the protester that American qualified its offer to provide lathes which would meet the specifications required by the solicitation. In its initial proposal and subsequent correspondence with the contracting office during discussions, American did not expressly take exception to any of the specifications set forth in the solicitation. Although American submitted with its initial proposal a brochure on the Feeler model FTL-618EM. In our view, based on the location and language of the references to the brochure in American's offer, the brochure was only included for the limited purpose of indicating the point of acceptance or delivery of the lathes and to indicate the guaranteed shipping weights and dimensions of the lathes. We note that in its initial proposal, its subsequent correspondence during discussions with the contracting office, and its best and final offer, American did not expressly identify the lathe which it was offering. There is nothing in American's offer which would indicate that the brochure enclosed with the initial proposal was intended to qualify its offer with respect to meeting the specifications which were incorporated into the solicitation. Furthermore, as pointed out by the agency, in a letter to the contracting office dated November 13, 1985, wherein American, in part clarified and modified its proposal in response to an amendment to the solicitation and the agency's request for additional information, American stated that it either met or exceeded the specification requirements. (As set forth above, the RFP did not require the offeror to furnish any technical data on the lathes). In view of the apparent limited purpose for the enclosure of the Feeler lathe brochure with American's initial proposal, and its statement of November 13 submitted as part of its offer that it met or exceeded the specifications for the lathe we must conclude that the agency properly determined that there was nothing in American's offer which would indicate that it would not comply with the solicitation's specifications. Thus, whether American will in fact deliver to the procuring agency a lathe which meets the solicitation's specifications is a matter of contract administration which is the responsibility of the contracting agency and is not for consideration under our bid protest function. Motorola, Inc., B-218888.3, Aug. 22, 1985, 85-2 C.P.D. ¶ 211.

As set forth above, in its protest with our Office Viereck also contends that American fraudulently represented that it is the manufacturer of the lathe which it offered and that it improperly certified that the lathe is primarily a domestic end item.

We note that in its comments on the agency report the protester has not referred to its prior allegation that the gearbox of the lathe offered by American fails to meet the specification requirements for a combination English and metric gearbox. Accordingly, we view this protest ground as having been abandoned by the protester. See Hamilton Sorter Co., Inc., B-220253, Nov. 22, 1985, 85-2 C.P.D. ¶ 592.

On the other hand, in its comments on the agency report dated June 6, 1986, the protester for the first time alleges that the lathe offered by American does not meet the requirement set forth in the ordering data

that the lathe have a spindle range of 125-3000 RPM. We consider this newly raised argument to be untimely. Protest arguments not raised in a protester's initial submission must independently satisfy the timeliness requirements of our Bid Protest Regulations, 4 C.F.R. part 21 (1986). Where the protester supplements its original protest with a new ground of protest in its response to the agency report more than 10 working days after the basis for the new argument should have been known, the new ground is untimely. Consolidated Group, B-220050, Jan. 9, 1986, 86-1 C.P.D. ¶ 21. Since Viereck should have known of this basis of protest as of March 30, the date it received, pursuant to a FOIA request, a copy of American's offer including the enclosed brochure on the Feeler lathe, the ground for protest is untimely.

In its initial proposal American did not indicate in subsection K-15 of the solicitation, the Walsh-Healey Public Contracts Act Representation, whether it is or is not a regular dealer or manufacturer of the lathe. Furthermore, in subsection K-37, the Buy American-Balance of Payments Program Certificate, American had listed as an excluded end product the castings and gears of the lathes and designated the country of origin of the castings and gears as Taiwan, R.O.C. However, in response to a request for clarification of its offer, in its November 13 letter to the agency, mentioned above, American represented that it is the manufacturer of the lathes and certified the lathes as being a domestic end product - 60 percent United States made and 40 percent of foreign content. Viereck contends that the brochure on the Feeler model FTL-618EM lathe clearly shows, contrary to American's representations, that the Feeler lathe is manufactured by the Feeler Machinery Ind. Co., Ltd. in Taiwan, R.O.C.

The matter of American's Walsh-Healey representation and the place of manufacture of the lathes were first raised by the Viereck in the protest filed with our Office on April 21. As set forth above, Viereck received a copy of American's proposal and offer, together with a copy of the Feeler model FTL-618EM brochure enclosed with American's initial proposal, on March 24, in response to its March 3 FOIA request. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), require that protests other than those based on alleged solicitation improprieties be filed within 10 days after the basis of protest is known or should have been known whichever is earlier. Thus, Viereck's protest grounds concerning the identity of the manufacturer of the lathes and the place of manufacture is untimely where the grounds for protest were first presented to our Office almost 1 month after Viereck first received the information which formed the basis of the protest grounds. In any event, with regard to the Walsh-Healey issue, we note that this is a matter for determination by the contracting officer, subject to final review by the Small Business Administration (where a small business is involved) and the Department of Labor. The Latta Co., B-221183, Feb. 24, 1986, 65 Comp. Gen. \_\_\_\_\_, 86-1 C.P.D. ¶ 187.

In accordance with the above, the protest is denied in part and dismissed in part.

*for Seymour E. ...*  
Harry R. Van Cleve  
General Counsel