



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: American Material Handling, Inc.

File: B-250936

Date: March 1, 1993

A. Sid Gross, President, American Material Handling, Inc.,
protester.
Jacqueline J. Jackson, CPT, JA, for the agency.
Julian Klazkin, Esq., and Robert G. Crystal, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Note sent to agency prior to bid opening complaining that specifications in solicitation were "written around" one particular supplier so that only that supplier could comply and asking to be "advised" constitutes a protest because it conveys an expression of dissatisfaction and requests corrective action.
2. Protest to General Accounting Office not filed within 10 working days of bid opening was timely, even though the bid opening was adverse action to the protester's agency protest, when protester initially was notified that it was the successful bidder, and its protest was filed within 10 working days of being subsequently notified by the agency of its determination to award the contract to another bidder.
3. Protest alleging that specifications are unduly restrictive is sustained because agency failed to show that the requirements in the solicitation were necessary to meet its minimum needs.

DECISION

American Material Handling, Inc. (AMH), protests the award of a contract by the Defense Supply Service-Washington, Department of the Army, to the Werres Corporation for a forklift. AMH contends that the specifications were unduly restrictive.

We sustain the protest.

The Army issued an invitation for bids (IFB) on August 3, 1992, for a Raymond model EASI2 31IR40TT forklift ("Brand

Name or Equal"). The IFB required that any "or equal" product comply with the salient characteristics listed in the specifications. It did not, however, contain any clause for descriptive literature. The Army received several bids.

Before bid opening, on August 24, AMH sent a note by facsimile to the Army alleging that the IFB was "written around" the Raymond model forklift, and requesting to be advised. The Army did not respond, and proceeded with the bid opening. AMH's bid was determined to be the lowest acceptable bid, and, on September 21, 1992, the Army decided to award the contract to AMH, and the other bidders were notified of this determination.

On September 25, Werres Corporation, which offered the Raymond model, protested to the agency, asserting that the forklift model bid by AMH did not meet a number of key specifications listed in the IFB. The contracting officer agreed, and on September 29 informed AMH by telephone that its model did not meet IFB specifications, but allowed AMH to submit an explanation of why its model met the specifications. On October 8, the Army notified AMH that its award was "invalid" and that the contract had been awarded to Werres on September 29. (It appears that the Army never actually executed an award to AMH.) AMH protested to the General Accounting Office (GAO) on October 15.¹

The Army argues that AMH's protest to GAO was untimely because it failed to protest before bid opening. Protests based on alleged improprieties in the specifications that are apparent prior to bid opening, as was the case here, must be filed before bid opening. 4 C.F.R. § 21.2(a)(1) (1992). The Army asserts that AMH's note of August 24 was not a protest. In the alternative, the Army argues that if the August 24 note is considered a protest to the agency, AMH's protest to the GAO was untimely because it did not occur within 10 working days of actual or constructive knowledge of initial adverse agency action, i.e., bid opening. See 4 C.F.R. § 21.2(a)(3) (1992).

In determining whether the August 24 note constituted a protest, the Army correctly cites our decision in Mackay Communications, B-238926.2, Apr. 25, 1990, 90-1 CPD ¶ 426, where we held that--

"even if a letter to an agency does not explicitly state that it is intended to be a protest, our

¹The Army did not suspend performance since the protest was filed more than 10 calendar days after it awarded the contract to Werres. 4 C.F.R. § 21.4(b) (1992).

Office nevertheless will consider it as such where . . . it conveys an expression of dissatisfaction and a request for corrective action."

The Army argues that AMH's August 24 note "does not protest the specifications but rather expresses reservations about the specifications, makes recommendations, and requests advice" and "does not enumerate that any specific action be taken but rather requests 'advice.'"

Although the August 24 note does not explicitly state that it is a protest and does not ask that any specific action be taken, it clearly conveys "an expression of dissatisfaction and a request for corrective action." The note expresses dissatisfaction by stating the opinion that the specifications "are written around one specific unit and if followed to the letter only Raymond could supply this unit." After recommending some changes in the specifications, the protester, in the note, requests corrective action by saying: "Please advise me." Accordingly, we will treat the note as a protest.

We also reject the Army's alternative argument that AMH's GAO protest was untimely because it was not filed within 10 days of bid opening, the initial adverse agency action. When an agency proceeds with bid opening without having addressed a bidder's protest, the bid opening constitutes initial adverse agency action. Norfolk Dredging Company, B-236259, Aug. 11, 1989, 89-2 CPD ¶ 134. AMH did fail to protest within the allotted 10-day period. However, AMH was informed that it was the successful bidder prior to the expiration of the 10-day protest period. The decision to award the contract to AMH clearly eliminated the basis for AMH's protest.

AMH's basis for protesting was revived on October 8, when the contracting officer officially notified AMH that its model did not meet the Army's needs. Until then, AMH reasonably could assume that the contracting officer was actively considering whether its model met the agency's needs. After receiving this notification, AMH protested to GAO within four working days, well within 10 days of being notified of the agency's adverse action.

We now turn to AMH's contention that the specifications were overly restrictive. The specifications of this procurement are detailed in five pages of the IFB. According to AMH, a number of features called for by the specifications, including several that AMH's forklift does not meet, are not significant. For example, specifications called for a minimum travel speed of 7 miles per hour when fully loaded, a minimum drive wheel size of 13" x 6", and a minimum lift speed of 63 feet per minute, and AMH's model had a minimum

travel speed of 5.4 miles per hour, a 13.5" x 5.5" drive wheel, and a lift speed of 50 feet per minute.

We will not object to specifications that are "written around" features of a particular item when the agency explains why those specifications are necessary to meet its minimum needs. Gal Sys., Inc., B-234283, May 8, 1989, 89-1 CPD ¶ 433; Fleetwood Elecs., Inc., B-216947.2, June 11, 1985, 85-1 CPD ¶ 664. When a protester challenges a specification as unduly restrictive of competition, it is the procuring agency's responsibility to establish that the specifications are reasonably necessary to meet its minimum needs. Embraer Aircraft Corp., B-240602, 240602.2, Nov. 28, 1990, 90-2 CPD ¶ 438.

The Army has failed to establish that the very detailed specifications are reasonably necessary to meet its minimum needs.² In explaining its needs and how it developed the specifications, a representative of the Army stated:

"Approximately a year ago my office started the process of gathering information on forklifts. Initially I went to Defense Supply Service, Transportation & Operation Division to obtain any information that they had on file. They provided me with a list of contractors from which I selected two companies to solicit information from. The two companies were the Werres Corporation and Potomac Industrial Trucks, Inc. Werres provided information on the EASI2 model and Potomac provided information on the Clark Forklifts. The Werres model met our minimum needs, therefore the origin of the specifications were from the information provided on the aforementioned EASI2 model."

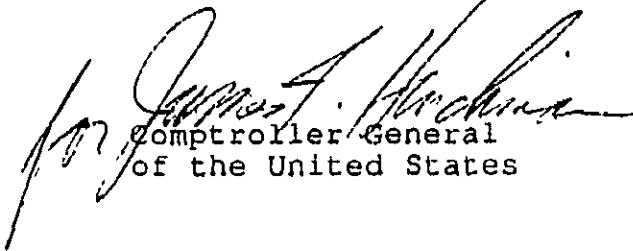
From this explanation, it appears that the Army had settled on the Werres model from the very beginning of the procurement and now suggests, without explanation, that each and every one of its specifications were necessary to meet its minimum needs. However, the Army's conclusory explanation fails to explain its needs. It does not address how any one of the specifications, including those objected to by AMH, were necessary.

²The Army did explain why it needed a 3-year warranty. It argues that since AMH's descriptive literature on the model it bid does not contain the required warranty, its protest should be denied for this reason alone. We do not agree. There is no indication that AMH would refuse to offer a 3-year warranty under a revised solicitation.

For example, the Army fails to explain why a minimum travel speed of 7 miles per hour is necessary and a travel speed of 5.4 miles per hour inadequate; why a 13" x 6" drive wheel is necessary and a 13.5" x 5.5" wheel inadequate; and why a lift speed of 63 feet per minute is necessary and lift speed of 50 feet per minute inadequate (in view of a maximum lift height of only 18 feet). These types of differences appear insignificant, and the Army has not shown otherwise. Thus, we conclude that the specifications were unduly restrictive.

Since the Army has taken delivery of the forklift, we are not recommending a reprourement of the item. However, we find that AMH is entitled to recover its costs of filing and pursuing the protest under 4 C.F.R. § 21.6(d) (1992). See Futura Systems, Incorporated, 70 Comp. Gen. 365 (1991). AMH should submit its claim for costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.


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