

**DECISION**



19322 *Shepherd*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-202096

DATE: September 4, 1981

MATTER OF: American Sterilizer Company

**DIGEST:**

1. Specifications for surgical lights derived by actual test and intended for the development of innovative surgical techniques are not unduly restrictive since the requirements reflect the minimum needs of the procuring agency.
2. Award of the contract during pendency of protest is valid and not subject to question when the contracting officer made required determination and finding and the decision to award was made by required authority higher than contracting officer in compliance with the Federal Procurement Regulations. The validity of the award is not affected by a failure to notify the protester promptly or because the notice set forth an erroneous basis for the award.

American Sterilizer Company (AMSCO) has protested as restrictive of competition the specifications in invitation for bids (IFB) 263-81-B-(87)-0015, issued by the National Institute of Health, Department of Health and Human Services (HHS) for surgical lights with accessories.

The IFB called for bids on a brand name or equal basis to furnish and install surgical lighting fixtures consisting of a single ceiling pedestal mount with four arms extending from the single pedestal, three carrying lampheads, and the fourth arm carrying a closed circuit television camera. The fixture was to be model "Hannulux London H" of the Siemens Corporation (Siemens), or equal. During the pendency of the protest, HHS made award to Siemens.

AMSCO contends that the specifications are unduly restrictive because they provide salient characteristics

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which are without a valid functional basis, are oriented toward the product of one supplier, Siemens, and call for an unsound product. The protest is directed principally to three requirements: the requirement of four arms of different lengths providing endless rotatability, the heat radiation limitation of 130 degrees Fahrenheit, and the requirement of 36 inches of vertical travel. The product manufactured by AMSCO does not meet these requirements.

The protest is denied.

Specifically, AMSCO contends that the requirement for four arms of unequal length from a central pedestal is unrealistic under actual operating conditions and can be better met by a combination of arms of 24 inches and 36 inches and two pedestals. The heat restriction relates to a wholly unrealistic hazard to the surgical team with no consideration for the most important person, the patient. AMSCO states it has never had a complaint about excessive heat from the back of its lamps. Finally, AMSCO alleges that the 30-inch vertical travel of AMSCO's equipment meets every essential need for recto-perineal and abdominal procedures and, on the basis of its knowledge of the uses and requirements for surgical lighting, the requirement of more vertical lamphead travel than 30 inches is excessive.

The report of the agency shows that the requirements were determined following a market survey with all manufacturers making this type of surgical lighting apparatus, an invitation to several firms to install one lighting fixture for a 3-month trial period, and a 3-month test. A team of doctors, together with specification writers determined the minimum salient features required to meet the physicians' needs. It was further determined that several manufacturers had the capacity to meet the requirements. Because the Siemens Model Hannulux London "H" met the requirements or was capable of modification to meet the requirements, it was used in brand name or equal provisions of an advertised procurement.

A protester who objects to the specifications in an invitation for bids bears a heavy burden. This is because we have recognized 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. Lanier Business Products, Inc., B-193693, April 3, 1979, 79-1 CPD 232. Therefore, the drafting of proper specifications, including the use of "brand name or equal" purchase descriptions, to meet the requirements of the Government and the factual determination as to whether any product offered thereunder conforms to the specifications, are matters primarily within the jurisdiction of the procuring activity. It is proper for a contracting agency to establish specifications reflective of its legitimate needs based on its actual experience, engineering analysis, logic or similar rational bases. We do not undertake to substitute our judgment for that of the agency in the absence of a clear showing of abuse of the discretion permitted it, and we will accept the judgment of the technical personnel of the agency involved where there is a difference of expert technical opinion, unless such judgment is shown to be clearly and unmistakably in error. Sparta Electronic Corporation, 49 Comp. Gen. 195 (1969); The Ellis Company, B-189390, B-189937, January 27, 1978, 78-1 CPD 70.

In general, the protest by AMSCO is that the requirements have no validity in the standard or known surgical procedures. However, the agency has indicated that the basic function of the NIH Clinical Center is to develop innovative surgical techniques. Therefore, the requirements of established surgical techniques are not relevant. On the basis of actual trial, the requirements set forth in the solicitation were determined to be necessary to the minimal needs of the agency. With a single exception, to be discussed below, we cannot find that this determination is without a reasonable basis.

Although AMSCO objects that the heat/temperature limitation does not consider the patient, the requirement is not limited. The provision states, as amended: "Shall have a surface temperature not to exceed 130° F per lamphead after one hour of continuous operation." As set forth in the solicitation, the limitation is not restricted to any part of the lamp. However, the heat generated by a lamp is generally radiated out the back of the lamp. The 130 degrees Fahrenheit temperature has been determined to be the burn threshold. The agency has stated that this may cause a possible burn hazard to the surgical team if they should inadvertently touch it. As pointed out by Siemens, such an occurrence could distract the surgeon or cause an accident in the operating room

by one of the surgical team. We cannot say that precautions against such an occurrence are unreasonable.

While the lamp offered by Siemens is capable of meeting or exceeding the specifications, it has not been shown that the specifications are drawn in such a manner as to preclude any product but that offered by Siemens, nor does Siemens offer a product which satisfies the specifications without modification by special manufacture. If the specifications represent the legitimate needs of the agency, they are not unduly restrictive because some bidders are unable to meet the requirements. Denelcor, Inc., B-186966, July 26, 1977, 77-2 CPD 48.

AMSCO also alleges, and neither HHS nor Siemens denies, that the requirement for 360 degree rotatability endlessly is not possible because of wiring considerations on the arm bearing the camera by any surgical lighting equipment including the equipment specially manufactured by Siemens and accepted by HHS. Siemens contends that this requirement was understood to relate only to the lamp bearing arms. The solicitation provision states:

"System shall consist of single ceiling pedestal mount with three (3) lampheads mounted on arms extending from the central ceiling pedestal mount. \* \* \*

"In addition to the three arms for the lampheads, there shall be a fourth arm to carry a closed circuit TV camera for viewing the actual surgical procedure. \* \* \*

"Each arm extending from the central pedestal shall be different lengths so that each arm is rotatable around each other by 360 degrees endlessly."

While Siemens' reading of the specifications is possible, we find AMSCO's reading to have equal validity and believe the specifications could have been more clearly written by HHS.

If we read this provision as does AMSCO, then the provision required that each of the four arms rotate around each other by 360 degrees endlessly, and exceeded the capacity of anyone to manufacture and was impossible of performance. Therefore, the bid of Siemens was technically

nonresponsive. However, it does not appear that the protester was prejudiced by this erroneous provision since it was not capable of satisfying other requirements which have not been shown to be erroneous.

AMSCO also protests the award of the contract to Siemens pending the protest alleging that the agency violated the Federal Procurement Regulations (FPR).

FPR § 1-2.407-8(b) provides that an agency may award a contract while a protest is pending if the action is approved at "an appropriate level above that of the contracting officer" and prior to this that the contracting officer has determined and documented that:

"(i) The items to be procured are urgently required; or

"(ii) Delivery or performance will be unduly delayed by failure to make award promptly; or

"(iii) A prompt award will otherwise be advantageous to the Government."

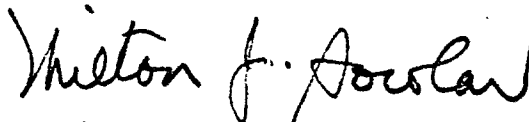
As provided by the regulations, the contracting officer made a determination and finding recommending that the contract be awarded. The Office of the Secretary approved award on the grounds that a prompt award would be advantageous to the Government. About a month after the award, the contracting officer erroneously notified AMSCO that the award was made because delivery or performance would otherwise be unduly delayed. AMSCO contends that it was prevented from taking any action against award because notice was delayed although the regulations contemplate prompt notice, and the award based on undue delay is not supported by the facts.

The award was not, however, based on undue delay but upon being otherwise beneficial to the Government because the only responsive bid would expire on the following day. Had award not been made the expense and delay of resolicitation would have been incurred.

In any event, we have regularly held that where the contracting officer acted in accordance with the regulations, the decision to proceed with the contract award is not subject to objection by our Office. New England Telephone and Telegraph Company, 59 Comp. Gen. \_\_\_\_\_

(B-197297, September 25, 1980), 80-2 CPD 225. Although the contracting officer notified AMSCO a month after award and erroneously indicated the basis for the award, these are procedural defects which do not affect the validity of the award. Airwest Helicopters, Inc., B-193277, June 7, 1979, 79-1 CPD 402.

The protest is denied.

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

Acting Comptroller General  
of the United States