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**DECISION**



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

**FILE: B-204385**

**DATE: December 24, 1981**

**MATTER OF: American Automotive Machinery, Inc.**

**DIGEST:**

1. When dissatisfied bidder alleges that lower bidders are offering equipment which does not meet specifications, identifying sections of solicitation involved by number, allegation should be regarded as protest even though word "protest" is not used.
2. Contracting agency cannot shift burden of discovering errors in solicitation to bidders or offerors, who have right to assume that clearly stated and unambiguous requirements will be enforced.
3. Contracting agency may not waive advertised specification if deviation from it goes to substance of bid or works injustice on other bidders. Substantial deviation is one which affects price, quality, or quantity of goods or services offered.
4. When other bidders appear to have been prejudiced, waiver of specifications is improper even though low bidder's equipment satisfies Government's needs and meets intent of specifications, and GAO will sustain protest on this basis.

American Automotive Machinery, Inc. protests the award of a contract for 34 crankshaft grinders under an invitation for bids issued by the U.S. Army Armament Materiel Readiness Command, Rock Island, Illinois, because the Danish awardee, Seest Machinery A/S, will supply equipment with gears fabricated in the metric system, rather than the English system of measurement specified in the solicitation.

During the pendency of the protest, the Army modified its contract with Seest to permit delivery of equipment with either metric or English gears. Because this waiver of specifications apparently prejudiced American Automotive, we sustain the protest.

Chronology of the Procurement:

The crankshaft grinders being procured are components of engine rebuilding tool sets for military vehicles; they are sent to units throughout the world, the Army states. In the protested procurement, American Automotive was one of seven bidders responding to solicitation No. DAA09-81-B-4476. The firm's president attended bid opening on July 16, 1981, and at that time advised the contracting officer, first orally and then by handwritten note, that none of the three low bidders was offering equipment which would meet military specification MIL-G-45006E. Specifically, American Automotive alleged that these bidders could not comply with section 3.4.7 of the specification because their gears were cut in the metric system. In addition, American Automotive alleged that the metric threaded parts of the equipment offered by these bidders did not conform to Federal Standard H28, as required by section 3.4.6, and in the case of Seest, that the machines lacked guards on the outboard weights, as required by the Occupational Safety and Health Administration standards referenced in section 3.3 of the specifications.

The Army states that it did not regard American Automotive's note as a protest, but considered it to be unsubstantiated information which would have no effect on evaluation. According to the Army, Seest had neither qualified its bid nor taken any exception to the specifications, so it was determined to be fully responsive. Seest also was found responsible, since it was the manufacturer on a contract for 40 crankshaft grinders awarded to Kloster Global Trade Limited, an American dealer, in May 1980. Seest was making timely deliveries of equipment which had been inspected and accepted by the Army's Quality Assurance Office in Europe and had received a favorable preaward survey at the time of that award. Therefore, on July 24, 1981, the same day it received a formal letter of protest from American Automotive, the Army awarded a \$1,053,864 contract to Seest. The protest to our Office followed.

American Automotive's Protest:

American Automotive initially argued that the contracting officer had violated Defense Acquisition Regulation (DAR) § 2-407.8 (1976 ed.) by making an award despite its protest at bid opening. The firm also alleged that due to congressional inquiries about the crankshaft grinders being delivered under the Kloster Global contract, the contracting officer knew or should have known that Seest's equipment did not meet specifications.

American Automotive subsequently filed a complaint in Federal court, seeking to enjoin the Army from permitting Seest to perform the contract, American Automotive Machinery, Inc. v. Marsh, No. 81-HM-5287-NE, N.D. Alabama, filed September 11, 1981. In an order entered October 9, 1981, the court denied the firm's motion for a preliminary injunction and requested a decision by our Office.

Following a conference on the protest at our Office, it was revealed that on November 13, 1981, the Army had modified its contract with Seest to permit delivery of equipment with metric gears. Both the president of American Automotive and the chief engineer for Winona Van Norman, a manufacturer of crankshaft grinders whom American Automotive represents, submitted affidavits to our Office, indicating that before bidding they believed their competition would be limited to one other domestic manufacturer and that no bidder offering equipment of foreign origin could qualify. American Automotive states that it therefore bid a standard Winona Van Norman crankshaft grinder, manufactured in the United States. If American Automotive had been aware that the English gear requirement was not a firm one, its president states, it could have offered Zan Rosso crankshaft grinders, manufactured in Italy at a lower price than the domestic equipment. The firm argues that the specification for English gears was unduly restrictive and that the Army awarded the contract with the apparent intent to modify it. This action, the firm concludes, was to the detriment and prejudice of American Automotive.

#### The Army's Response:

The Army initially argued that so long as Seest was responsive and responsible, award to it was required, and that the contracting officer reasonably disregarded American Automotive's allegations at bid opening. The record includes a memo to the contracting officer from his technical advisors, dated August 24, 1981, which concludes on the basis of a review of available literature that Seest's equipment either meets or exceeds specifications in all material respects. This memo, however, states that section 3.4.7 of the specifications, requiring English gears, is "extremely in error." It continues:

"All of the machine tool specifications are being revised to eliminate the English gear requirement. \* \* \* Department of Defense

Directive number 4120.18, dated 10 December 1976, explains the use of the Metric System of Measurement. Therefore, even though the specification requires English gears, the [G]overnment cannot support the need of such gears. It is unfortunate that the specification was not amended \* \* \*, but regardless the [G]overnment cannot enforce the English gear requirement."

According to the contracting officer, this was the first time he actually knew that Seest's equipment did not meet military specification MIL-G-45006E. The Kloster Global contract was covered by an earlier military specification, MIL-G-45006D, which had been changed to permit delivery of equipment with gears fabricated in either the metric or English system of measurement. In preparing the technical data package for the protested procurement, the Army states, the engineering staff at Rock Island inadvertently overlooked the change to the "D" version of the specification. The Army states that it had always intended to permit metric gears, and that it did not make award to Seest with the intent of waiving the specifications.

The Army states that when it discovered that the "E" version of the military specification required English gears, the engineering staff recommended that it be changed. The contracting officer, using the Changes clause, therefore executed a modification of section 3.4.7 of the Seest contract permitting all gears and pinions to be fabricated "in the English (U.S.) or the metric (SI) system of measurement." The record indicates that the modification was made at no cost to either party and that neither Seest nor any higher military authority was notified in advance.

The Army argues that since it made an "inadvertent engineering error," the only issue for our consideration is whether this error prejudiced any prospective contractor. In support of its position that no prejudice occurred, the Army states that on the prior procurement, which resulted in the Kloster Global contract, Winona Van Norman declined to bid. In addition, the Army argues that American Automotive has not shown that it could have underbid Seest, pointing out that Kloster Global, offering Zan Rosso equipment, was not the low bidder on this procurement. According to the Army, every known manufacturer of crankshaft grinders submitted a bid this time, so no other firm was prejudiced and there was adequate competition.

The Army further argues that American Automotive should have been on notice of potential foreign competition from the Buy American and Qualifying Countries clauses in the solicitation; that American Automotive should have protested before bid opening, since it knew that the "E" version of the military specification omitted metric gears; and that the firm specifically should have asked the contracting officer to compare the "D" and "E" versions of the specifications. The Army concludes that American Automotive somehow "aided and abetted" in the events which led to the award to Seest, and is now improperly attempting to restrict competition to domestic manufacturers.

#### GAO Analysis:

There is no dispute that the Army's solicitation was overly restrictive, since either metric or English gears will meet the Government's needs. The record includes a report of a September 1981 inspection of a Seest crankshaft grinder delivered under the Kloster Global contract in which the Rock Island engineering staff states that the equipment is "entirely adequate to perform the grinding functions required."

While we find no evidence of fraud, bad faith, or that the contract was awarded to Seest with the intent of modifying it, we believe the contracting officer should have known that the solicitation did not reflect the Government's minimum needs. Foreign competition was expected, since on May 13, 1981, the Army issued an amendment to the solicitation canceling a total small business set-aside. One of the justifications which the Army gave for making this an unrestricted procurement was to permit competition by Kloster Global and other bidders offering products of foreign origin. (Firms offering foreign products are not eligible to compete under small business set-asides. See DAR § 1-701.1(a)(1).) We believe the Army should have recognized that such competition would be likely to involve equipment with metric components and made certain that the specifications reflected the fact that it was acceptable.

In any event, at bid opening we believe the Army should have been alerted to the problem. American Automotive not only alleged that the low bidders were offering equipment which did not meet specifications, but identified by number the sections of the military specification which it believed they could not comply with, and stated why. We do not believe the contracting officer was free to disregard these allegations, since

DAR § 2-407.8(a) permits oral protests. It is not necessary that a dissatisfied bidder use the word "protest," so long as he otherwise conveys an intent to protest and the objections which he lodges are reasonably specific. Applied Devices Corporation, B-203241, September 9, 1981, 81-2 CPD 207; Diesel Parts of Columbus, B-200595, July 20, 1981, 81-2 CPD 50.

In our opinion, the Army should have attempted to determine whether there was any basis for American Automotive's allegations, American Athletic Equipment Division, AMF Incorporated--Reconsideration, 59 Comp. Gen. 90 (1979), 79-2 CPD 344, and at the same time considered whether, in view of these allegations, Seest was a responsible contractor, see generally Federal Aviation Administration--Request for Advance Decision, B-185071, December 10, 1975, 75-2 CPD 387, or whether the specifications, as written, exceeded the Government's minimum needs. The contracting officer could have checked the sections of the specification cited by American Automotive and, if necessary, consulted with the engineering staff at that time, rather than proceeding to award the contract within a week of bid opening and obtaining a technical review more than a month later.

Moreover, we do not believe the Army, as it has attempted to do here, can shift the burden of discovering errors in a solicitation to a bidder or offeror who can meet its requirements. Since the English gear requirement was stated in clear and unambiguous terms, American Automotive had a right to assume that it would be enforced, see 46 Comp. Gen. 275, 277 (1966), and on the basis of that requirement, to anticipate the scope of competition for award. Houghton Elevator Division, Reliance Electric Company, 55 Comp. Gen. 1051 (1976), 76-1 CPD 294.

Further, since American Automotive had not participated in the procurement which resulted in the Kloster Global contract, it was not necessarily aware of the differences between the "D" and "E" versions of the military specification. The fact that the firm sought congressional assistance in investigating the equipment being delivered by Seest, and initially supported this protest by contending that it was nonconforming, tends to confirm that American Automotive did not know that the "D" version of the specification had been changed to permit metric gears when it protested to the Army.

Because of its impact on the competitive bidding system, affecting the right to compete on a common basis, a contracting agency may not waive an advertised specification if the deviation from it goes to the substance of a bid or works an injustice to other bidders. Our Office has defined a substantial deviation as one which affects the price, quality, or quantity of goods or services offered, 46 Comp. Gen. 275, supra.

Price is clearly affected here. The abstract of bids indicates that the three low bidders, offering metric gears, had unit prices of \$30,996 (Seest), \$31,117 (Kloster Global), and \$37,525 (Stoffel Grinding Systems); American Automotive--with English gears--was fourth-low at \$39,992. During the conference at our Office, cheaper European labor rates and variations in exchange rates were cited as reasons why equipment of foreign origin was lower-priced. In addition, at least in the case of Seest, the Army was not required to apply a Buy American Act differential, since the Secretary of Defense had waived the application of the Act by memorandum of understanding dated January 30, 1980.

Thus, the deviation was substantial, and the fact that Seest's equipment satisfied the Government's needs and met the intent of the specifications does not make the waiver proper. See Cohu, Inc., B-199551, March 18, 1981, 81-2 CPD 207; B-170235, November 18, 1970.

We agree with the Army that our decision therefore must turn on whether any prospective contractor was prejudiced by the defective specification and the Army's decision to waive it. See Cummings Marine Systems, Inc., B-197506, August 21, 1980, 80-2 CPD 136.

We are not persuaded by the various arguments advanced by the Army in its attempt to show that no prejudice occurred. In our opinion, it is irrelevant that Winona Van Norman did not bid on the prior procurement. In addition, we do not think the standard DAR clauses--Buy American Act and Balance of Payments, Duty-Free Entry of Qualifying Country Supplies, and Qualifying Country Sources as Subcontractors--listed in the general provisions of the solicitation were sufficient to place American Automotive on notice that equipment with metric gears would be acceptable.

Moreover, the fact that all known manufacturers were represented in this procurement does not insure that maximum practical competition was obtained where, as here, other American dealers of foreign manufacturers clearly were eligible to participate and might have done so if the change permitting metric gears had been made to the specification.

Most importantly, we think it is speculative to assert that American Automotive could not have underbid other firms offering equipment of foreign origin. There was a mere \$121 difference between Seest and Kloster Global, offering Zan Rosso equipment; this was out of total unit prices of \$30,996 and \$31,117, respectively. A slight difference in profit margin could easily account for this spread, and we will not speculate as to the type of arrangement which American Automotive might have made for a Zan Rosso dealership or the degree to which it might have been willing to cut its profit in an attempt to gain this award.

In similar cases, where it was reasonably clear that even if a protester had been informed of a relaxed requirement, it would not have been able to lower its price sufficiently to be competitive and thus would not have been in line for award, we have found there was no prejudice. See, for example, KET, Inc.--Request for Reconsideration, B-190983, January 12, 1981, 81-1 CPD 17, in which there was an \$8 million difference in price between the protester and the successful offeror.

On the other hand, when we could not say with certainty whether prejudice had occurred, we have stated that the only means of determining which prospective contractor would offer the lowest price to the Government is to resolicit with revised specifications reflecting the Government's actual needs. Domar Industries, 57 Comp. Gen. 924 (1977), 77-2 CPD 150; ABS Duplicators, Inc., et al., 56 Comp. Gen. 497 (1977), 77-1 CPD 247, aff'd B-187604, May 25, 1977, 77-1 CPD 364. We find that course of action appropriate here and, in view of this finding, do not reach the question of other alleged technical deficiencies in the equipment offered by Seest and the second and third-low bidders.

In response to our request for an estimate of termination costs, the Army states that production is 50 percent completed and that termination would run about \$500,000



(\$419,000 for materials, \$58,000 for labor, and \$22,200 for "intangibles"). The Army also argues that the crankshaft grinders still are urgently needed, since it has on hand high priority requisitions from units in Mannheim, Germany; Ft. Carson, Colorado; Ft. Irwin, California; and Ft. Sill, Oklahoma, and delays associated with resolicitation would impair the effectiveness of these and other units.

The record indicates, however, that first deliveries by Seest are not scheduled to be made until June 1982, and the estimates of termination costs apparently are based on telephone conversations with Seest. We informally are advised that they have not been confirmed in writing or by the responsible Department of Defense audit group. We therefore recommend that the Army obtain a precise, written estimate of production status and termination costs, reassess its current and projected needs, and then terminate that portion of the Seest contract which is compatible with its needs for this equipment. See EMI Medical, Inc., 59 Comp. Gen. 169 (1980), 80-1 CPD 153 (also involving a contract improperly awarded because the contracting officer misinterpreted the specifications). In the resolicitation, military specification MIL-G-045006E should be changed to permit gears to be fabricated in either the metric or English system of measurement.

By letters of today, we are advising the U.S. District Court and the Secretary of the Army of our views.

The protest is sustained.

*Harry D. Van Cline*  
For Comptroller General  
of the United States