

DECISION



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

FILE:B-206453.2

DATE: November 1, 1982

MATTER OF: Deere & Company

DIGEST:

1. Cancellation of solicitation will not be disturbed where contracting agency determines after bid opening that specification overstates minimum needs.
2. Specification of one of several transmissions permitted by the Federal specification overstates the Government's minimum needs when the using agency makes no showing that the specified transmission is needed for the intended use of the motor grader.
3. Competitive advantage to one manufacturer of motor graders by use of a less expensive transmission than used by other manufacturers of motor graders does not result in an "unfair" advantage.

Deere & Company (Deere) protests the cancellation of invitation for bids (IFB) DLA700-82-B-0960 issued by the Defense Logistics Agency (DLA) for a road grader in accordance with Federal Specification 00-G-630E.

We deny the protest.

The IFB was issued pursuant to a purchase request from the United States Marine Corps (USMC). As originally issued, the IFB specified, under "Ordering Data," the manufacturer's commercial power shifting arrangement. Paragraph 3.9.1 of the Federal specification provides that when a power shift transmission is specified, depending upon the normal practice of the grader manufacturer, the grader shall be equipped with one of the following shifting arrangements: (a) shifting under full engine power through successive forward and reverse gear ratios, (b) shifting under full engine power through successive forward and reverse gear ratios within ranges, and (c) shifting from forward to reverse or vice versa by a rocket pedal in lieu of a clutch pedal without handshifting. The Federal specification also provides that one of the described shifting arrangements may be selected.

The USMC issued an amendment to the purchase request to require the transmission shifting under full engine power through successive forward and reverse gear ratios, the type (a) transmission, and the IFB was accordingly amended to delete the requirement permitting either the type (a), (b) or (c) shifting arrangement and to restrict the procurement to a road grader with the type (a) transmission. Two bids were received on the amended IFB. Deere was the apparent low bidder.

However, Champion Road Machinery International Corporation (Champion), which manufactures road graders with the type (b) transmission, protested the amended specification as unduly restrictive. On investigation by DLA, the only justification for the restrictive specification given by USMC was that the type (a) transmission is allegedly the latest state-of-the-art, is more productive and efficient, and, while purchase of a grader with the type (b) transmission would be less expensive, it would not be in keeping with the asserted policy of the Government to procure the latest state-of-the-art equipment to achieve optimum production and efficiency. DLA found the justification by USMC to be legally insufficient and canceled the solicitation.

Deere contends that the Government did not have proper grounds for canceling the solicitation since bids had been opened, two bids were received, and, therefore, the specification was not restrictive. Deere questions that cancellation was "clearly in the best interest of the Government," the grounds cited by DLA for cancellation, since the user alleged uninterrupted highway traveling was needed, and it is Government policy to procure the latest state-of-the-art to achieve optimum production and efficiency. Deere also alleges that under the Federal specification, which permits three different transmissions and states that one of the three may be selected, the user has a right to purchase the transmission which best fits its need. Deere challenges the wisdom of falling behind the state-of-the-art to satisfy the condition of meeting only the Government's minimum needs. Deere contends that, taken literally, under minimum needs the Government is limited to rigid frame graders, rigid frame loaders, manual typewriters, etc. Keeping up with the state-of-the-art is alleged by Deere to be, in the long run, more efficient and economical

and definitely more clearly in the best interest of the Government than was the cancellation of the 'solicitation. Finally, Deere alleges that Champion has a distinct and unfair competitive advantage in Federal procurements because, of the four major manufacturers of motor road graders, Champion alone utilizes the type (b) transmission, which is less expensive than the type (a) transmission used by the other major manufacturers.

Defense Acquisition Regulation § 2-404.1 (Defense Acquisition Circular 76-17, September 1, 1978) provides, and our Office has often stated, that a solicitation may be canceled after bid opening only when a compelling reason for the cancellation exists. A compelling reason for cancellation exists when it is determined that an IFB contains specifications which overstate the minimum needs of the procuring agency or the agency after bid opening decides that the needs of the Government can be satisfied by a less expensive design differing from that on which bids were invited. Uffner Textile Corporation, B-204358, February 8, 1982, 82-1 CPD 106.

The Federal specification treats each of the three designated transmission types as equally permissible. Therefore, while a using agency may select one type, it must justify that selection by showing that it is required by the use to which the motor graders will be put. While the using agency alleged that the type (a) transmission was more efficient and more productive, the agency made no showing that the demands of the uses to which the motor graders would be put required the designation of a particular type of transmission.

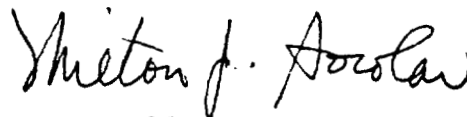
Also, the fact that two bids were received and that three companies could have bid does not establish that the specification was not "unduly" restrictive if it unnecessarily prevented one or more companies from competing. Champion, at least, was prevented from competing and there was no showing of a necessity for that restriction.

We have stated that a solicitation provision which limits potential offerors' freedom to propose products which are believed to be suitable is an undue restriction on competition unless the contracting activity can establish a prima facie basis for the requirement. Since the

benefit of competition, both to the Government and to the public, in terms of price and other factors,, is directly proportional to the extent of competition, a contracting agency may impose a restriction on the competition only if it can be shown that, after careful consideration of all relevant factors, the restriction is deemed necessary to meet the agency's minimum needs. This Office has taken the position, therefore, that restrictions on competition need not be regarded as unduly restrictive when they represent the actual needs of the agency. The adequacy of the justification for a restrictive provision is evaluated not simply in regard to the reasonableness of the rationale asserted, but by examining the analysis given in support of those reasons. Data Card Corporation, Orbitran Division, B-202782, October 8, 1981, 81-2 CPD 287.

Deere also alleges that Champion has a definite and "unfair" advantage because it chooses to produce a motor grader with a less expensive type of transmission and, therefore, can presumably submit a lower bid. However, we have recognized that firms may enjoy a competitive advantage by virtue of their own particular circumstances and that the Government is not required to equalize the advantage. Ronald Campbell Company, B-196935, December 19, 1979, 79-2 CPD 424.

Since the determination by DLA that the specification was unduly restrictive is not unreasonable, we will not disturb the cancellation. Uffner Textile Corporation, supra.



Acting Comptroller General
of the United States