DECISION

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

B-24525

FILE: B-206111.2 et al. DATE: March 16, 1983

MATTER OF:

A & P Surgical Company, Inc; Columbia Surgical Instruments Co., Inc.

DIGEST:

1. Agency properly canceled solicitation after bid opening where bidders might have offered unacceptable foreign specialty metal products relying on a clause in the solicitation which no longer accurately reflected the agency's interpretation of applicable law, because the solicitation, as written, failed to reflect the Government's needs.

2. Agency is not required to warn bidders in solicitation that a statutory exception permits award to bidder offering foreign specialty metal end product where the bid does not exceed $10,000.

3. Agency interpretation of Department of Defense Appropriation Act restriction against the purchase of articles consisting of foreign specialty metals as reflected in DAR § 6-302 is to be accorded deference. GAO will not object to DAR § 6-302 provision that statutory restriction is met if the specialty metal is melted in the United States, notwithstanding protester's contention that statute requires that such articles be manufactured entirely in the United States. DAR provision is based on wording in legislative history and has been in existence for 10 years without congressional objection.

A & P Surgical Company, Inc. (A & P), and Columbia Surgical Instruments Co., Inc. (Columbia), have filed various protests against Defense Logistics Agency (DLA) procurement procedures which authorize the procurement of foreign-manufactured, specialty metal end products for use by the Department of Defense (DOD). For the reasons which follow, we deny all the protests except one filed by Columbia, which we dismiss.

A & P protested against solicitation No. DLA120-82-B-0852 (B-0852) on the basis that the apparent low bidder would furnish specialty metals not manufactured in the United States. DLA thereafter canceled B-0852 and issued soliciation No. DLA120-82-B-1866 (B-1866). DLA's reason for the cancellation was that because the end product consisted of both a plastic and a specialty metal, potential bidders might have been misled by the advice in B-0852 that "any article furnished which is to be comprised solely of specialty metals shall be considered a specialty metal * * * within the meaning of Clause I42." DLA's revised solicitation B-1866 warned bidders that the end product sought was considered by DLA to be a specialty metal subject to clause I42. A & P immediately protested the cancellation of B-0852. A & P contends that there was competitive prejudice because the second solicitation resulted in the same bidders bidding the same end items of foreign manufacture. A & P also filed a protest (B-207779.2) against award under the new solicitation (B-1866) on the same ground that it had objected to any award under the B-0852 solicitation.

Columbia's protest (B-207243.2) against solicitation DLA120-82-B-1599 (B-1599), issued jointly by DLA and the Veteran's Administration, is on grounds identical to those advanced by A & P, above.

A & P also protested (B-208006) against solicitation No. DLA120-82-R-1660 (R-1660), contending again that the low offeror intended to furnish items not produced entirely in the United States and also the absence of any warning in the solicitation that the statutory preference in favor of domestic specialty metals was inapplicable to procurements not in excess of $10,000.

Columbia also protested (B-207702.2) against solicitation No. DLA120-82-B-1819 (B-1819), advancing the same argument that the low bidder intended to furnish end items not entirely produced in the United States. We dismiss as academic this protest because DLA's rejection of Columbia's bid samples as nonresponsive has rendered Columbia ineligible for award, and Columbia has not contested DLA's rejection.

The major question raised by the protests is the scope of protection against foreign competition afforded specialty metals under the Appropriation Act restriction.

Specifically, the protesters argue that section 723 of the DOD Appropriation Act, 1982, Public Law No. 97-114, approved December 29, 1981, 95 Stat. 1565 at 1582 (Appropriation Act), in conjunction with our decision in National Graphics, Inc., 49 Comp. Gen. 606 (1970), prohibits DOD activities from purchasing specialty metal end products which have not been entirely manufactured within the United States or its possessions.

DLA contends that it can properly purchase such end products if the specialty metals have been melted (the first stage of production) domestically, notwithstanding the fact that the end products are manufactured overseas. DLA cites Defense Acquisition Regulation (DAR) § 6-302 (DAC No. 76-25, October 31, 1980) and the legislative history of various defense appropriation acts as authority for its position.

The practice of attaching specific commodity procurement prohibitions to DOD appropriation acts began in 1941 with the Fifth Supplemental National Defense Appropriation Act, P.L. No. 29, April 5, 1941, 55 Stat. 123. That act prohibited the use of appropriated funds "for the procurement of any article of food or clothing not grown or produced in the United States." 55 Stat. 123, at 125. Since 1941, the Congress has added additional commodities. With the exception of specialty metals, the additions are products of either the clothing or the textile industries. The Appropriation Act here under consideration reads in pertinent part:

> "No part of any appropriation contained in this Act, except for small purchases in amounts not exceeding $10,000, shall be available for the procurement of any article of food, clothing, cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured

> articles), or specialty metals including stainless steel flatware, not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton, woven silk and woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, wool, or specialty metals including stainless steel flatware, grown reprocessed, reused or produced in the United States or its possessions cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations, procurements by vessels in procurements * * *."

DAR § 6-302, which implements the Appropriation Act restrictions, reads in pertinent part as follows:

> "Restriction. Except as provided in 6-303, there shall not be acquired supplies consisting in whole or in part of any food, clothing, * * * coated synthetic fabric, which have not been grown or produced in the United States or its possessions; or specialty metals including stainless steel flatware which have not been melted in steel manufacturing facilities located within the United States or its possessions * * *." DAR § 6-302 (DAC No. 76-25, October 31, 1980).

The protesters argue that the DAR § 6-302 statement that only specialty metals not melted in the United States are prohibited is inconsistent with our decision in 49 Comp. Gen. 606 (1970). In the 1970 decision, referred to by the parties as National Graphics, we held that, as regards cotton, another listed commodity in the provision, even though wiping pads were made from cotton grown in the United States, the fact that the pads were of foreign manufacture precluded their purchase with DOD funds. We found the intent of the Congress was that any article of cotton would be considered "American" only when the origin of the

raw fiber, as well as each successive stage of manufacture, was domestic. 49 Comp. Gen. 606, 609 (1970).

DLA contends that National Graphics is not controlling for specialty metals because of the placement of the specialty metals wording in the statute following the parenthetical phrase "(whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles)" and because it is preceded by the word "or." DLA's argument, with which the protester disagrees, is that such placement shows that specialty metals are to be accorded treatment different from the other listed commodities. Because of the "or" preceding specialty metals, the initial phrase "any article of" would only apply to those items listed before the parenthetical phrase, thus requiring them to be totally domestic, but only requiring specialty metals (in their material stage) to be produced domestically.

The protesters contend that specialty metals should receive the same treatment as the other commodities listed in the Appropriation Act limitation and must be totally manufactured in the United States, not merely melted in the United States. A & P and Columbia also refer to the legislative history of the 1972 Appropriation Act, when specialty metals were added, which contains testimony from industry representatives stating that the specialty metals industry consists of 38 small integrated companies--"integrated" meaning that they operate melting furnaces as well as finishing facilities for the production of specialty products. See Record of Hearings before the House Committee on DOD Appropriations for 1973 (May 11, 1972), page 338. The protesters state that the Congress was attempting to protect the entire operations of the industry, not just the melting portion of production.

DLA cites House of Representatives Report No. 92-1389 on the 1973 DOD Appropriation Act to show that its regulation (DAR § 6-302) is consistent with the intent of the Congress. At page 770 of the report, it reads:

> "The action recommended by the Committee means that no part of any appropriation contained in this Act shall be available or be expended for the procurement of any article containing any

> specialty metal not melted in steel manufacturing facilities located within the United States or its possessions except to the extent that the Secretary of the Department concerned shall determine that a satisfactory quality and sufficient quantity of any such article containing specialty metals melted in steel manufacturing facilities located within the United States and its possessions cannot be procured as and when needed at United States market prices and except for procurements outside of the United States in support of combat operations."

In addition to the above, both the protesters and DLA have quoted extensively from the legislative histories regarding the 1973 DOD Appropriation Act and other legislation, including the "Berry Amendment" to the DOD 1953 Appropriation Act (P.L. 448, 10 July 1952, 66 Stat. 517, 521), which was the forerunner of the current Appropriation Act limitations.

We have carefully considered all the arguments advanced by the protesters, but we believe the critical factor to be that the wording of DAR § 6-302 regarding "melting" appears to be based on interpretation of the Act and House Report 92-1389, and the regulation has been in existence for over 10 years and the Congress has not objected to DOD's interpretation of the statute. We have noted that deference is to be accorded to the interpretation given a statute by the officers or agency charged with its administration. Colorado State University, B-194627, December 27, 1979, 79-2 CPD 438. Moreover, we agree with DLA that National Graphics, decided before specialty metals was added and DAR § 6-302 was issued, is not controlling here, based on the placement of the wording in the statute.

Since the DAR provision has a reasonable basis and has contained the disputed wording for 10 years without congressional objection, we do not object to the DOD interpretation.

Regarding the cancellation of B-0852, DLA argues that it was proper--

> "in order to apprise bidders of a significant change in * * * [DLA's] interpretation of the term 'specialty metals' as used in * * * clause I42. Previously, the term has been interpreted by * * * [DLA] as referring to basic specialty metal material only. The interpretation of the term was now broadened by the notice provision to include end products made of specialty metal material. The broadened interpretation was based on the view * * * that basic specialty metals which are stamped, forged, and/or otherwise fabricated into end products are actually specialty metals in other form."

Since the solicitation contained a notice advising bidders that only end items solely comprised of specialty metals would be considered specialty metals, DLA believed that the notice could have influenced bidders to offer supplies which were not acceptable. In other words, the bidders might have offered instruments which consisted of stainless steel which was not melted in the United States.

While we agree with A & P that the rejection of all bids and cancellation of a solicitation after bid opening is generally a practice to be avoided because of its adverse effect on the competitive system, we have also found it to be properly within the broad authority of a contracting officer where a cogent and compelling reason justified the cancellation. Hampton Metropolitan Oil Co.; Utility Petroleum, Inc., B-186030, B-186509, December 9, 1976, 76-2 CPD 471. It should be noted, however, that if the Government's needs can be met and competition was achieved, the mere use of inadequate or defective specifications will not alone justify a cancellation. See The Intermountain Company, B-182794, July 8, 1975, 75-2 CPD 19.

In this case, we find the cancellation to be proper. The Government's needs were for specialty metals melted in the United States. Bidders could have bid foreign melted specialty metals and, in fact, all six bidders, with the exception of the protester, did so. Apparently, the five foreign bidders relied on the fact that the specifications called for a molded plastic cover on the instrument and

reasoned that the instrument provided would not be solely of specialty metals and, consequently, need not consist of specialty metals melted in the United States. See E. Miltenberg, Inc., B-207346, November 29, 1982, 82-2 CPD 479. Accordingly, the solicitation was defective since it could have misled bidders to offer unacceptable items and cancellation was the proper remedy.

A & P contends that solicitation R-1660 should have warned bidders that the Appropriation Act prohibition against DOD purchase of specialty metals did not apply to procurements not in excess of $10,000. It is DLA's position that the absence of a warning was not prejudicial to either actual or potential bidders since the exception for purchases not exceeding $10,000 had been in annual DOD appropriation acts since the act for fiscal year 1977. We are advised, however, that DLA's solicitations now warn offerors that clause I42 only applies if the resulting award exceeds $10,000.

We find no basis for the position advanced by A & P. We rejected a similar argument in Crockett Machine Company, B-189380, February 9, 1978, 78-1 CPD 109, saying "we have seen no argument or evidence of a statutory or regulatory requirement that notice must be given before an exception to the Buy American Act can be invoked." In view of the close relationship between the Buy American Act and the Appropriation Act, we see no reason for a different result here.

The protests are denied, and Columbia's protest against B-1819 is dismissed.

for Milton J. Socolar
Comptroller General
of the United States