

C. Morrow



**Comptroller General  
of the United States**

Washington, D.C. 20548

**Decision**

**Matter of:** Diverco, Inc; Metalcastello s.r.l.  
**File:** B-240639.2; B-240639.3; B-240820;  
B-240820.2; B-240836  
**Date:** December 21, 1990

Charles A. Raley, Esq., Israel and Raley, for Diverco, Inc.  
Richard P. Diehl, Esq., for Metalcastello s.r.l., the  
protesters.  
Susan K. Rosen, for A & H Automotive Industries, an interested  
party.  
Thomas M. Hillin, Esq., Defense Logistics Agency, for the  
agency.  
Charles W. Morrow, Esq., and James A. Spangenberg, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

**DIGEST**

1. Clause requiring domestic forgings was properly included in a Department of Defense solicitation for items that are considered "final drive gears" on combat support vehicles, where the agency does not find the quantity being acquired is greater than that required to maintain the domestic mobilization base for these items.
2. Protest that awardee's offers were technically unacceptable under solicitations for components of final drive gears for combat support vehicles, which required domestically manufactured metal forgings, is sustained, where the awardee's proposals indicated that the forging would be done in a foreign country.
3. Contract awards to offeror, whose offer indicated it did not intend to comply with the Department of Defense Federal Acquisition Regulation Supplement § 208.7801 et seq. requirements for domestic forging, are not void ab initio, where agency and awardee were confused as to the applicability of the requirements and appeared to be acting in good faith.
4. Protest that contracting agency improperly deleted clause from request for proposals (RFP), which required domestically manufactured forgings, is rendered academic where the agency reinstates the clause.

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5. Awardee's protests against the contracting agency's requesting new proposals are rendered academic where the awardee's contracts are ultimately not disturbed.

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**DECISION**

Diverco, Inc. protests the awards of contracts by the Defense Logistics Agency, Defense Construction Supply Center (DCSC), to Metalcastello s.r.l. under requests for proposals (RFP) No. DLA700-90-R-0437 (-0437) for 2,452 gearshaft spurs (National Stock Number (NSN) 3040-00-734-7714) and No. DLA700-90-R-0211 (-0211) for 1,685 helical gears (NSN 3020-00-953-9909), because Metalcastello's proposals did not comply with clause I-81 of the RFP, "Required Sources for Forging and Welded Shipboard Anchor Chain Items Used for Military Application for Combat and Direct Combat Support Items" (Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.208-7005 (1988 ed.)). Diverco also protests the deletion of clause I-81 from RFP No. DLA700-90-R-1470 (-1470) for 1,842 helical gearshafts (NSN 3040-00-885-3123). Metalcastello protests DCSC's reopening of discussions and requests for best and final offers (BAFO) on RFPs -0437 and -0211.

We sustain Diverco's protests of RFPs -0437 and -0211 and dismiss Diverco's protest of RFP -1470 and Metalcastello's protests of RFPs -0437 and -0211.

Each of the RFPs, as issued, contained clause I-81, which generally requires all end items and components to contain domestic forging manufactured in the United States or Canada. The applicability of this clause is governed by the DFARS, section 208.7802 of which states in relevant part:

"It has been determined that defense requirements for the forging items listed [below] . . . must be acquired from domestic sources (United States and Canada) to the maximum extent practicable. Accordingly, all acquisitions of these forging items and all acquisitions of items containing these forging . . . items shall include, except as provided in [section] 208.7803 . . . a requirement that such items and forging items incorporated in end items delivered under the contract be of domestic manufacture<sup>[1/]</sup> only. This restriction does not include forgings used for commercial vehicles (such as commercial cars and trucks) or . . . noncombat support military vehicles."

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<sup>1/</sup> DFARS § 208.7801 provides that "domestic manufacture" means forging items manufactured in the United States and Canada.

Included on the list of forging items that must be acquired from domestic sources are certain tank and automotive forgings, including "final drive gears."<sup>2/</sup> DFARS § 208.7802-1. DFARS § 208.7803 states:

"[Clause I-81] shall be inserted in all contracts except--

"(1) when the contracting officer knows that the item being acquired does not contain [the listed forging items];

"(2) when purchases are made overseas for overseas use;

"(3) if the quantity being acquired is determined to be greater than that required to maintain the U.S. defense mobilization base (provided the quantity above mobilization base needs constitutes an economical buy quantity), such greater quantities will not be subject to the U.S., Canadian restriction and shall be awarded competitively to the maximum practical extent. . . ."

DCSC received nine offers on RFP -0437 by January 8, 1990. Metalcastello, the lowest offeror with a unit price of \$91.51, indicated in its proposal that except for packaging, the contract would be performed in its plant at Poretta Terme, Italy. Diverco, the fourth lowest offeror with a unit price of \$114.15, had the lowest offer that clearly agreed to furnish gearshaft spurs with forging manufactured in the United States.<sup>3/</sup> On February 23, DCSC awarded Metalcastello the contract without discussions on this matter because it was the low priced offeror.

On January 8, DCSC received seven offers under RFP -0211. Metalcastello, whose offer indicated that all manufacturing (except for packaging) would occur in Italy, was the lowest

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<sup>2/</sup> Other listed tank and automotive forgings include: turret rings, road arms, shafts, track shoes, axle shafts, flywheels, connecting rods, crankshafts, roadwheels, spindles, and torsion bars.

<sup>3/</sup> The second and third low offerors' proposals indicated other than domestic manufacture of this item. In response to the protest, the third low offeror stated that it could furnish domestically manufactured forging. That offeror's proposal, however, does not indicate that it intended to do so.

offeror with a unit price of \$52.40. Diverco, which specifically proposed domestic forging, was the next lowest offeror with a unit price of \$64. On March 2, DCSC awarded Metalcastello the contract without discussions on this matter because it was the low priced offeror.

On March 6, DCSC issued RFP -1470 for helical gearshafts and received several offers, including offers from Metalcastello and Diverco. To date, no award has been made under the RFP.

With regard to RFPs -0437 and -0211, Diverco filed agency-level protests respectively on March 5 and 13 alleging that the awards to Metalcastello were improper because Metalcastello did not comply with clause I-81. In response to DCSC inquiries on RFP -0437, Metalcastello asserted that clause I-81 was not applicable because these parts were not one of the listed forging items that must be acquired from domestic sources and because the vehicles for which the parts are intended are noncombat support military vehicles.

DCSC initiated a technical review to determine the applicability of the clause to these procurements. The Technical Division at DCSC and the U.S. Army Tank-Automotive Command (TACOM) advised that clause I-81 governs these procurements because the gearshaft spurs and helical gears in question are components of the final drive gears of 2-1/2-ton and 5-ton trucks, which are combat support military vehicles. Accordingly, DCSC, between April and June, repeatedly requested Metalcastello to confirm that domestic forgings would be furnished. Metalcastello continued to dispute DCSC's determination that the items would be used on combat support vehicles or that they were "final drive gears." DCSC issued to Metalcastello a stop work order under RFP -0437 on May 25.<sup>4/</sup> No similar action was taken on RFP -0211.

In July 1990, DCSC changed its position. Notwithstanding the advice of the DCSC Technical Division and TACOM, DCSC concluded that clause I-81 should not have been included in RFPs -0437 and -0211. DCSC determined under DFARS § 208.7803 that the quantity of these items being acquired would exceed the quantity necessary for maintaining the defense mobilization base because DCSC's Industrial Preparedness Planning Branch did not list gearshaft spurs or helical gears as defense mobilization base requirements on its Industrial

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<sup>4/</sup> On June 11, DCSC advised Metalcastello that unless the condition was cured within 10 days it might terminate the contract for default.

Preparedness Planning List (IPPL).<sup>5/</sup> DCSC also believed that, in any event, its requirements were sufficiently urgent that it would not terminate Metalcastello's contract under RFP -0437, particularly since Metalcastello did not agree it was contractually required to supply domestic forged items. On July 17, DCSC denied Diverco's protest with regard to RFP -0437, and on July 19 it authorized Metalcastello to continue performing under this contract.

On August 1, Diverco filed a protest of RFP -0437 with our Office, arguing in effect that the Metalcastello proposal was technically unacceptable. On that same date, Diverco filed an action in the United States District Court for the District of Columbia. In the court action, Diverco sought temporary and preliminary injunctive relief pending our decision on its protest.<sup>6/</sup> In opposing this action, DCSC advised the court that it had an urgent need to fulfill its gearshaft spur requirements and that it intended to take certain corrective actions, including providing offerors another opportunity to revise their offers.<sup>7/</sup> The court denied Diverco's motion for a preliminary injunction on the basis that Diverco would not suffer irreparable harm, since it could submit another offer and it could recontest the resulting contract to our Office. The court also believed that DCSC might suffer substantial injury awaiting a decision from our Office because of the urgent need for the part.

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<sup>5/</sup> The record shows that the DCSC's belief that the helical gears were not a listed item on the IPPL was erroneous.

<sup>6/</sup> Diverco argued that the contract with Metalcastello was illegal and that it was entitled to the award, and that Metalcastello's continued performance under the contract would jeopardize whatever remedy might be fashioned in this Office.

<sup>7/</sup> DCSC advised the court that it would: (1) issue a stop work order to Metalcastello; (2) delete clause I-81 by amending the RFP; (3) conduct a second round of BAFOs in order to provide offerors an equal opportunity to offer domestic or foreign forging; and (4) make an award to the lowest offeror, which, if it were Metalcastello, would permit continued performance under the original contract.

On August 3, DCSC issued an amendment to RFP -1470 that deleted clause I-81 and requested BAFOs. On August 7, DCSC issued a stop work order on RFP -0211, which remains in force. On August 9, DCSC amended RFPs -0437 and -0211 to solicit revised prices in accordance with the corrective action it represented to the court. See footnote 7, infra. On August 10, DCSC denied Diverco's protest of RFP -0211 because of the corrective action being taken.

On August 17, Metalcastello protested to our Office that the agency's actions on RFPs -0437 and -0211 were improper because they constituted an illegal auction and because they may have the effect of overturning proper awards after Metalcastello had incurred substantial expenses on the contracts. On August 17, Diverco protested to this Office DCSC's deletion of clause I-81 from RFP -1470 and the proposed corrective action under RFP -0211. On August 23, Diverco protested the corrective action undertaken by DCSC with respect to RFP -0437.<sup>8/</sup> Diverco asserts that clause I-81 was required to be in the RFPs. With regard to RFPs -0437 and -0211, Diverco urges that it should receive the awards as the low acceptable offeror, that is, the only offeror proposing domestic forgings, and asserts that requesting new prices constituted an illegal auction.

In response to the protests, DCSC filed a consolidated report in our Office on September 21, a copy of which it also furnished to Diverco and Metalcastello. In that report, DCSC advised that it had modified its position again and now believed that clause I-81 was applicable to RFPs -0437 and -0211, and that it was reexamining whether this clause applied to RFP -1470. As discussed above, DCSC based its determination not to apply the I-81 restriction on a belief that to do so was unnecessary for maintaining the defense mobilization base. The agency asserts that this view could not reasonably be based upon whether the item was listed on the IPPL or the Planned Producers List (PPL). Since DCSC could not support its determination that the domestic mobilization base requirements for this item were satisfied, it found that clause I-81 was required to be included in the RFPs. See DFARS § 208.7803.

The central issue of these protests is whether clause I-81 is applicable to these RFPs. DCSC's cognizant technical personnel have uniformly maintained that the gearshaft spurs and helical gears are components of the "final drive gears" of 2-1/2-ton and 5-ton trucks, and we have no basis upon which to

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<sup>8/</sup> Diverco's initial protest of RFP -0437 was dismissed as academic because of DCSC's corrective action.

challenge that conclusion.<sup>9/</sup> We also agree with the finding of DCSC and TACOM that the trucks--which are "tactical" vehicles, are often used to carry ammunition and are capable of accessing rough terrain--are combat support vehicles. DCSC and Metalcastello state that the applicability of this clause is in doubt because the RFPs did not announce that the 2-1/2- and 5-ton trucks were combat support vehicles. The legal requirement for domestic forgings is not dependent on such an announcement, and we conclude that clause I-81 was applicable to the procurements in question.

As discussed above, DCSC now believes that its decision to delete clause I-81 from the RFPs was in error since there is insufficient evidence that the mobilization base requirements for these parts have been satisfied. DCSC reports that the presence or absence of an item from the IPPL or the PPL is not conclusive evidence of the mobilization requirements for the item. The agency contends that until it establishes a procedure for identifying the mobilization base requirements for these items, the restriction in clause I-81 applies. We agree. Indeed, the fact that the items (final drive gears for combat support vehicles) are listed in DFARS § 208.7802-1 reasonably establishes that there is a mobilization requirement for these items, whether or not the items are specifically listed on an IPPL or PPL. DFARS § 208.7803 clearly is intended to protect domestic sources until there is a sufficient quantity to maintain defense mobilization needs for the items. Since there is no evidence that the amounts of the parts required under these procurements exceeds those necessary to maintain the mobilization base, clause I-81 was properly incorporated in the RFPs and was applicable to all offers submitted.<sup>10/</sup> Cf. NFA, Inc., B-236455.2, Dec. 11, 1989, 89-2 CPD ¶ 536 (inclusion of a preference for domestic commodities clause in a solicitation indicates the clause will apply to offers, such that award was properly made to a higher priced offeror that offered a domestic, instead of a foreign, commodity.)

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<sup>9/</sup> While Metalcastello asserted to the agency these parts cannot be final drive gears because only tanks have final drive gears, it has not supported this position in its protests and comments to our Office. Based on our review, we cannot say DCSC's position on this matter is erroneous.

<sup>10/</sup> DCSC has recently informed our Office that on December 7, 1990, the Office of the Assistant Secretary of Defense (Production and Logistics) granted DCSC a class deviation from the requirements of DFARS § 208.7801 et seq. for automotive forgings.

Metalcastello's offers on RFPs -0437 and -0211 indicated that it would not comply with clause I-81, even though that clause was specifically checked as applicable. While Metalcastello and DCSC assert that Metalcastello's offers did not preclude it from submitting domestic forging items and did not take specific exception to this requirement, Metalcastello's proposals clearly evidenced an intent to supply foreign forgings. Not only did Metalcastello's proposal indicate that all manufacturing (except packaging) would be done in Italy, but the post-award discussions with that firm confirmed that this was Metalcastello's intent. Under the circumstances, DCSC should not have made award on the basis of Metalcastello's noncompliant offer. See Federal Data Corp., 69 Comp. Gen. 196 (1990), 90-1 CPD ¶ 104; A&H Automotive Indus., Inc., B-225775, May 28, 1987, 87-1 CPD ¶ 546.

We sustain the protests of Diverco on RFPs -0437 and -0211.

Diverco contends that the contract awards should be canceled as void ab initio since they are in violation of DFARS § 208.7801 et seq. We have adopted the view that an awarded contract should not be treated as void, even if improperly awarded, unless the illegality of the award is plain or palpable. Peter N.G. Schwartz Co. Judiciary Square Ltd. Partnership, B-239007.3, Oct. 31, 1990, 90-2 CPD ¶ 353; John Reiner & Co. v. United States, 324 F.2d 38 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964). In this case, the record indicates that DCSC and Metalcastello were both confused as to the applicability of the questioned requirement, as evidenced by DCSC's changes in position on this matter. Under the circumstances, since it appears that both DCSC and Metalcastello were acting in good faith, we cannot say the awards are void ab initio.

DCSC has notified our Office that the stop work order was lifted under the contract awarded under RFP -0437 due to an urgent need for the item because of a critical supply shortage, which may jeopardize its ability to meet mission essential requirements (specifically, Desert Shield). DCSC also reports that although the need for helical gears is not yet critical, it could become so if Metalcastello's contract is terminated due to the long lead time necessary for this item. Metalcastello has advised that the contracts under RFPs -0437 and 0211 have been substantially performed with significant cost expenditures (70 percent), and DCSC, while not adopting Metalcastello's figures, persuasively states that these contracts are likely substantially performed. Therefore, DCSC asserts that it would not be in the best interests of the government to terminate Metalcastello's contracts.

Diverco contends that the government's interests would be better served if the contracts were terminated and the awards made to Diverco since it contends it could meet the urgent requirements. However, we do not believe that Diverco is necessarily entitled to the award under the RFPs, inasmuch as the failure of Metalcastello to indicate compliance with clause I-81 could have been the subject of competitive range discussions, particularly since it offered the lowest prices. See A&H Automotive Indus., Inc., B-225775, *supra*; Sechan Elecs., Inc., B-233943, Mar. 31, 1989, 89-1 CPD ¶ 337. Indeed, Metalcastello persuasively states that if required to do so it would have supplied domestic forgings. Moreover, given the DFARS waiver that has been granted to the application of the domestic forging requirements, see footnote 10, *infra*, it is not clear that clause I-81 would be included in any resolicitation of this requirement.

Under the circumstances, we do not recommend that DCSC terminate the contracts under RFP -0437 and -0211. We do find, however, that Diverco is entitled to recover its proposal preparation costs and the cost of filing and pursuing the protests on these RFPs, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990).

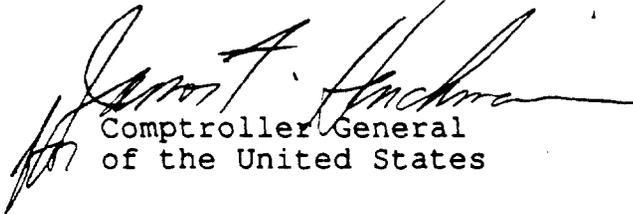
With regard to RFP -1470, DCSC determined, on November 28, that clause I-81 was applicable and has reincorporated it into the RFP. Therefore, Diverco's protest against DCSC's deletion of this requirement from the RFP is academic. This protest is dismissed.<sup>11/</sup>

Metalcastello's protests are also dismissed as academic. Although Metalcastello continues to argue that illegal auction techniques were employed, no useful purpose would be served in considering these issues, since Metalcastello's contract awards are not affected. See Gartrell Constr., Inc.; U.S. Floor, Inc., B-237032; B-237032.2, Jan. 11, 1990, 90-1 CPD ¶ 46.

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<sup>11/</sup> Diverco has protested DCSC's right to request a second round of BAFOs in connection with this action, which may be the subject of a separate decision (B-240836.2).

Accordingly, Diverco's protests of RFPs -0437 and -0211 are sustained, and Diverco's protest of RFP -1470 and Metalcastello's two protests are dismissed.

  
Comptroller General  
of the United States