ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
ABS Baumaschinenvertrieb GmbH	)	ASBCA No. 48207
	)	
Under Contract No. DAJA02-94-C-0023	)	

APPEARANCES FOR THE APPELLANT:	Reed L. von Maur, Esq. J. Casey Fos, Esq. Reed L. von Maur Sulzbach, Germany
APPEARANCES FOR THE GOVERNMENT:	COL Michael R. Neds, JA Chief Trial Attorney MAJ Richard J. Anderson, JA Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN

Appellant timely appealed a contracting officer's final decision terminating the subject contract for default. The contracting officer terminated the contract for default because, according to the Government, appellant manufactured and attempted to deliver a coal crushing machine which did not meet the Government's design and performance specifications. Appellant contends that it was not in default because its machine met the performance requirements of the specifications, and further, that the design portion of the specifications was defective. Appellant further contends that the specifications were altered in the contract. Appellant also contends that the contracting officer's termination of the contract for default was arbitrary and capricious. The Government contends that the termination was proper, and in the alternative, that the contract was void *ab initio*, and that, therefore, the Board has no jurisdiction over the dispute.

FINDINGS OF FACT

Pre-Contract Background

1. During the period of 1990 to 1991, the Government's Defense Fuel Region, Fixed Facility Fuels Branch, Rheinau, Germany determined that the Army and Air Force had approximately 20,000 tons of anthracite stove coal stockpiled at the Rheinau Coal Yard (tr. 1/23-24). Anthracite stove coal is a large size coal of approximately 35 to 40 mm in size. Based on consumption estimates, this stockpile would have lasted 20 to 30 years. However, both the Army and Air Force had use for a smaller size coal, that is,

anthracite nut coal, rather than the anthracite stove coal, and did not have a large stockpile of this size coal. The largest size coal at the Rheinau Coal Yard was anthracite egg, which was approximately 200 to 250 mm in size. There were no boilers in Germany that could utilize this size coal.

2. Accordingly, on or about February 1992, Mr. Gunther von Dungen, the Manager of the Rheinau Coal Yard, and Mr. Rolf Keller, the Chief of Operations and Maintenance at the coal yard, conducted market research to determine the feasibility of purchasing a plant to crush and screen anthracite coal stored at the coal yard (R4, tabs 3, 71; tr. 1/22, 24-24, 30). They received brochures and information regarding available coal crushing machines from a number of prospective suppliers located in the United States and in Germany (R4, tabs 41-49, 96; tr. 1/24-29, 32-39).[1] Starting in early 1992, Rheinau Coal Yard officials began discussions for the production of such a plant with Fa. Noell Service und Montagetechnik GmbH (Noell) and Noell's affiliate firms, Fa. Vörös Umwelt- und Verfahrenstechnik GmbH (Vörös) and Fa. HAZEMAG Service und Machinentechnick GmbH (HAZEMAG) (R4, tabs 41-43; tr. 1/24-29, 32-39, 89-92, 2/6-10). On 5 May 1992, the manager of the Rheinau Coal Yard wrote Fa. Noell requesting brochures and "non-binding price proposals" for a mobile coal crushing and screening plant that could be manufactured by Fa. HAZEMAG (R4, tab 42; tr. 1/93-99). Fa. Vörös was a sales company, rather than a manufacturer, and Fa. HAZEMAG was its manufacturing affiliate (tr. 1/101-02, 2/6-8). By letter, dated 25 June 1992, Firm Vörös responded to this request and to a meeting between Mr. Vörös with the Government's representatives from the Rheinau Coal Yard, recommending a price for the plant as approximately DM 650,000 (R4, tab 43). This letter also included specifications for the movable coal crushing and screening plant, which according to the letter had been agreed upon between Mr. Keller and Mr. von Dungen and the representatives of Fa. Vörös during their meeting of 10 June 1992 (R4, tabs 43, 64). Prior discussions between the Government and Mr. Vörös had resulted in estimates in the range of DM 1 million for a plant with an output capacity of 100 metric tons per hour, which had been the output capacity initially sought by the Government (tr. 1/93-99). From the beginning of discussions between the Government and Fa. Vörös and Fa. HAZEMAG, design and construction of the machine and price ranges had been discussed.

3. During these discussions with Fa. Vörös and Fa. HAZEMAG, Messrs. von Dungen and Keller of the Rheinau Coal Yard outlined the Government's general requirements for a coal crushing and screening plant, including output capacity, coal size, and the form of mobility, based on information they had received from the various brochures (tr. 1/46-53, 2/60). When the Government learned of the originally estimated price from Fa. Vörös for a machine with a capacity of 100 metric tons per hour, it reduced its required capacity to 50 metric tons per hour output capacity, for a plant with a maximum input coal size of 300 mm. and a mobile truck platform for the plant (tr. 1/46-53, 93-99). The Government did not, however, provide Fa. Vörös and Fa. HAZEMAG

with any specific, desired component's dimensions, weight, or size requirements, and did not supply Fa. HAZEMAG with any list of standard market items or components that could be incorporated into HAZEMAG's design of the coal crusher (R4, tabs 64, 65; tr. 1/50-54, 2/59-60, 5/141-46).

4. As a result of these discussions, Fa. HAZEMAG submitted several draft specifications for a coal crushing and screening plant (R4, tab 64; tr. 1/50-53, 2/12-18). Each of these drafts reflected changing Government requirements for the machine and revisions, including reduced crushing capacity, reduced maximum sizes of input coal, desired output sizes of coal, and whether or not the design would provide for a movable, or semi-movable plant (tr. 2/12-21, 67-70).

5. On 6 July 1993, Mr. Keller and Mr. von Dungen requested a commitment of funds for the purchase of a coal crushing and screening plant, and recommended that Fa. Noell provide the plant (R4, tab 3). The estimated price stated on the purchase request was DM 675,200, based on the quoted price proposal and draft specifications received from Fa. Vörös, an affiliate of Fa. Noell, on 25 June 1992 in response to the meeting between Mr. Keller and Mr. von Dungen with Mr. Vörös on 10 June 1992 (finding 3; R4, tabs 43, 64).

6. By early August 1993, the Government and HAZEMAG had agreed to a reduced output capacity of 10 to 25 metric tons per hour, an input coal size of 0 to 150 mm, with single pieces up to 200 mm, and an end output size of 0 to 50, with a minimum amount of coal fines 0 to 20 mm as output product (R4, tab 65; tr. 2/19-21). The specifications prepared and provided by Mr. Juergen Stuttmann of Fa. HAZEMAG to the Government specified a brand name item, WM-L 0810 roller breaker. However, this component was a Walzenmuehle (mill), rather than a Walzenbrecher (breaker), both of which were HAZEMAG brand name items, and was the core component of the crushing machine (tr. 1/122-23, 2/84-87). This designation of HAZEMAG's mill rather than breaker was included by Fa. HAZEMAG by mistake in its drafting of the specification. The correct designation should have been for a breaker, or Fa. HAZEMAG's designated product, WB-L 0810. Nevertheless, this component was not identified in the specifications as a brand name item. The documents, including the computations which were made to determine the components and their dimensions from appellant's product line, were processed through a Fa. HAZEMAG computer program. This was proprietary information not available outside the company to the general public (tr. 2/98-102). As a result, the computations based on WB would give different conclusions from computations based on the WM since a roller breaker (WB) does not work in the same manner as would a roller mill (WM) (tr. 2/72-73). Separate computations and designs were required for the other components and were related to guarantying functionality of the coal crusher and screening plant (tr. 55-57). Mr. Stuttmann included in his design furnished to Mr. von Dungen and to Mr. Keller, the screening system manufactured by

Fa. Haverand Boecker. Fa. Haverand Boecker determined the size of the screening machine and designed it based on the technical parameters Mr. Stuttmann provided it. Mr. Stuttmann then took this information and selected the size for the screening machine based on his experience. In its 4 August 1993 letter to Rheinau, Fa. HAZEMAG stated that the attached specifications "should serve you as solicitation document for the invitation of further bids." (R4, tab 65, English translation) Fa. HAZEMAG also stated in this letter that its recommended price for the plant would remain at DM 650,000, plus value added tax.

7. These specifications provided to Mr. von Dungen, the manager of Rheinau Coal Yard by Fa. HAZEMAG on 4 August 1993, were submitted in the German language (R5, tab 65). In response to the Government's request, on 12 August 1993, Fa. HAZEMAG submitted to Mr. Keller, the Chief of Operations and Maintenance at the Coal Yard, a complete breakdown of the estimated costs for the components of the coal crushing and screening plant totaling DM 650,000 (R4, tab 67; tr. 1/174). Mr. von Dungen and Mr. Keller translated these specifications into English (R4, tab 1, tr. 1/55-59, 126-28). They photocopied the Fa. HAZEMAG specifications, after removing the HAZEMAG name and logo and Rheinau Coal Yard address from the top of each page of the German specifications, and issued the German specifications as part of the procurement package as the "COURTESY TRANSLATION." The English translation of Fa. HAZEMAG's specification continued the mistaken identification of the WM-L 0810 roller mill (R4, tab 1). The English version of the specification was formatted slightly differently and included several additional paragraphs at the end covering acceptance inspection and testing, performance standards, protective and safety measures, site cleanup, and work schedules. There were no changes to the technical performance and design requirements set forth in the Fa. HAZEMAG specifications.

8. The second page of the specifications contained a general description and the performance requirements for the coal crushing and screening plant (R4, tab 1). The length and width of the platform were specified as 10,000 mm and 3,000 mm respectively. The capacity in tons per hour was 10 to 25. The inlet material was US Anthracite Coal, with an inlet size of 0 to 150 mm, with single pieces up to 200 mm. The processing of coal was specified to be through a control screen in the cycle into circulation whereby oversize pieces in excess of 50 mm would be loaded by a scoop loader into the funnel. The remaining pages of the specification specified the components and their respective dimensions. These included the screening plant dimensions which were based on the proposal by Fa. Haverand Boecker (finding 6), and five conveyor belts.

9. Mr. von Dungen requested a drawing of a specific coal crushing and screening plant, and Fa. HAZEMAG, by facsimile dated 11 August 1993, forwarded the drawing to the Mr. von Dungen (R4, tab 66). The drawing was Fa. HAZEMAG's proprietary

information used to manufacture the machine, and was not the kind of document that would be available to the public (tr. 2/99).

10. Based on the specifications prepared by Mr. Stuttmann and provided with the price estimate by Fa. Vörös and Fa. HAZEMAG to the Mr. von Dungen, Mr. von Dungen submitted a purchase request to the Regional Contracting Office with an estimated price of DM 650,000 and a recommendation of Fa. Vörös as the supplier of the coal crusher for the Rheinau Coal Yard (R4, tab 52). On 6 July 1993, Mr. von Dungen submitted another purchase request with an estimated price for the procurement of DM 676,000, and recommended Fa. Noell as the supplier (R4, tab 62).

11. The Federal Acquisition Regulation (FAR) 9.505-2 (1 January 1994)[2], in effect at the time of this procurement, provided in pertinent part that:

> (a)(1) If a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition, that contractor shall not be allowed to furnish these items, either as a prime contractor or as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract.
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> . . . .
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> (2) If a single contractor drafts complete specifications for nondevelopmental equipment, it should be eliminated for a reasonable time from competition for production based on the specifications. This should be done in order to avoid a situation in which the contractor could draft specifications favoring its own products or capabilities. In this way the Government can be assured of getting unbiased advice as to the content of the specifications and can avoid allegations of favoritism in the award of production contracts.

The regulation further required in FAR 9.507-1 that the solicitation contain a provision that invited potential offerors' attention to this subpart, that stated the nature of the potential conflict as seen by the contracting officer, that stated the nature of the proposed restraint upon future contract activities, and that stated whether or not the terms of any proposed clause and the application of this subpart to the contract were subject to negotiation.

12. Prior to the issuance of the Invitation for Bids, there had been considerable discussion with the requiring activity, the Rheinau Coal Yard, as to whether the

solicitation should be issued as a request for proposals (RFP) or as an invitation for bids (IFB) (tr. 2/122). The decision to issue an IFB, the preferred method of contracting in Europe rather than an RFP, was based on the contracting officer's understanding that the specifications were clear and concise, and that the only remaining issue was price, even though there had been some problems in the command with certifications, language, and responsiveness issues (tr. 2/122, 142-43). The record is unclear how these conclusions were communicated from Mr. von Dungen and Mr. Keller to the contracting officer and how the decision was made, particularly since Mr. von Dungen wrote in a memorandum to the contracting officer on 9 September 1994 in connection with his recommendation to terminate the contract with appellant for default that both he and Mr. Keller were of the "opinion that such a complex machine (which is only assembled based upon customer request/contract) requires technical coordination between manufacturer and customer, especially since Mr. Keller never specified such a machine or even a similar machine before." (R4, tab 37) Moreover, the specifications were prepared by Mr. Stuttmann and based on Fa. HAZEMAG product line items.

13. The IFB was issued on 4 January 1994 (R4, tabs 1, 4). There were no provisions in the IFB setting forth the conditions required by FAR 9.507-1. The IFB included both the English and "courtesy translation" German versions of the specifications prepared by Fa. HAZEMAG, and the English translation of Fa. HAZEMAG's price proposal, with its breakdown of estimated costs for the components, as the "U.S. Government Estimate," notwithstanding the prohibitions and limitations set forth in FAR 9.205-2. The IFB, without regard to the requirements of FAR 9.205-2, also listed as recommended firms for this procurement Fa. HAZEMAG and Fa. Noell, and also Fa. Kaiser Kran-und Greiferbau, MAN-Wolfkran GmbH, and Peiner Maschinenwerke AG. These latter three firms were not manufacturers of coal crushing plants (tr. 1/109-11). Section J of the IFB, List of Attachments, listed the specifications for the coal crushing and screening plant. According to this listing, the specifications consisted only of nine pages for the English version and nine pages for the German translation. Section J did not identify the "Government Estimate" with its detailed price breakdown, the list of recommended firms, and any drawing. Although the IFB contained the Government estimate and list of recommended firms, it did not include the drawing for the coal crusher and screening plant prepared by Fa. HAZEMAG and submitted to the Government on 11 August 1993 (tr. 2/126, 129-30).

14. Approximately one week before bid opening, Mr. Stuttmann of Fa. HAZEMAG spoke with Mr. von Dungen and informed him that HAZEMAG had changed dimensions in the specifications for the size of the screen from 3 meters to 2.5 meters, and the width of the conveyor belt from 800 mm to 650 mm since these dimensions were all that were required to satisfy the output capacity performance requirement of the specification (tr. 1/163-65, 2/87-90). Mr. Stuttmann had further discussions with Fa. Haverand Boecker, and concluded based on the advice he received

from Fa. Haverand Boecker that the width of the conveyor belt and length of the screen could be reduced without affecting the performance required for achieving the capacity requirement of 10 to 25 tons per hour (tr. 2/87-89). According to the testimony of Mr. von Dungen, he simply took the information and did nothing about it since the solicitation had already been issued. However, Mr. Stuttmann, who prepared the specifications, testified for the Government that these changes had been discussed with the Government representatives at the Rheinau Coal Yard and had been approved by Mr. von Dungen and Mr. Keller. These changes were not incorporated into the specifications in any amendment to the IFB.

15. The regulation (FAR 14.301) Responsiveness of bids, provided in pertinent part:

> (a) To be considered for award, a bid must comply in all material respects with the invitation for bids. Such compliance enables bidders to stand on equal footing and maintain the integrity of the sealed bidding system.
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> . . . .
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> (d) Bids should be filled out, executed, and submitted in accordance with the instructions in the invitation. If a bidder uses its own bid form or a letter to submit a bid, the bid may be considered only if (1) the bidder accepts all the terms and conditions of the invitation and (2) award on the bid would result in a binding contract with terms and conditions that do not vary from the terms and conditions of the invitation.

The regulation further provided in FAR 14.404-2:

> (a) Any bid that fails to conform to the essential requirement of the invitation shall be rejected.
>
> (b) Any bid that does not conform to the applicable specifications shall be rejected unless the invitation authorized the submission of alternate bids and the supplies offered as alternates meet the requirements specified in the invitation.

According to FAR 14.407-1:

> (a) The contracting officer shall make a contract award (1) by written notice, (2) within the time for acceptance specified in the bid or an extension (see 14.404-1(d), and (3) to that responsible bidder whose bid, conforming to the invitation, will be the most advantageous to the Government, considering only price and price-related factors (see 14.201-8) included in the invitation. Award shall not be made until all required approvals have been obtained and the award otherwise conforms with 14.103-2).
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> . . . .
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> (c)(5) All provisions of the invitation for bids, including any acceptable additions or changes made by a bidder in the bid, shall be clearly and accurately set forth (either expressly or by reference) in the award document. The award is an acceptance of the bid, and the bid and the award constitute the contract.
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> (d)(1) Award is generally made by using the Award portion of the Standard Form (SF) 33, Solicitation, Offer, and Award, or SF 1447, Solicitation/Contract (see 53-214). If an offer on an SF 33 leads to further changes, the resulting contract shall be prepared as a bilateral document on SF 26, Award/Contract.

FAR 14.103-2, referenced in FAR 14.407-1(a), prohibits the award of a contract made as a result of sealed bidding unless the bids have been solicited in accordance with Subpart 14.2, have been submitted as required by Subpart 14.3, and is made to the responsible bidder whose bid is responsive to the terms of the invitation for bids and is most advantageous to the Government, considering only price and price-related factors included in the invitation.

16. Five bidders submitted bids, including Firms Noell, and ABS (R4, tab 5). The Fa. Noell's bid contained the changes to the screen size and width of the conveyor belt referred to in the HAZEMAG's telephone call to Mr. von Dungen (finding 14; exs. G-1, G-2). The cover letter with the Noell bid confirmed the earlier telephone call and the Government's approval of these changes (ex. G-2; tr. 2/89). The bid of Fa. Noell was the low bid, but was rejected as nonresponsive at bid opening because it lacked a signed Certificate of Procurement Integrity (R4, tab 5; ex. G-3; tr. 2/107-109, 122-23). The contracting officer was not aware of the changes proposed in Noell's letter, and there is no evidence that he discovered these changes in reviewing the actual bid, since he

determined that Noell's bid was non-responsive because of its lack of the Certificate of Procurement Integrity and he did not consider the bid beyond that point (tr. 2/135-40).

17. Appellant ABS, a sales company which maintained machinery and provided machinery service, did not manufacture machines (tr. 3/111-12). Normally, ABS got business from customers expressing their requirements, and then turned to its suppliers that were manufacturing firms to produce the required machines. Appellant received a copy of the IFB, with both English and German text specifications (tr. 4/9-12). It sent inquiries to a number of its manufacturing company suppliers, including Fa. BWM Bergwerksmaschine Dietlas GmbH (BWM), and sent BWM a copy of the IFB with specifications requesting BWM to develop specifications for a coal crusher. Fa. BWM prepared an offer which included detailed specifications for a semi-mobile coal crusher which purported to satisfy the performance requirements specified on the second page of the Government's specifications, and a price quotation (R4, tabs 1, 76; tr. 4/12).

18. Upon receiving a copy of the German version of the specifications from appellant, Dr. Martin Walter, an engineer for BWM, reviewed the specifications, with particular attention to the performance requirements specified on the second page of the specifications, to determine if the design requirements of the components as described in the remaining pages harmonized with the performance requirements (tr. 4/97-99). Applying standard industry formulae and standards for determining the optimal dimensions for coal crushing machines, he personally dimensioned the components with BWM's technical branch and determined that the design as set forth in the last eight pages of the specifications conflicted with the performance requirements set forth on the second page of the specifications. He, therefore, concluded that the design specified in the last eight pages of the specification would not produce the performance results required by the second page (R4, tabs 1, 78, 95; tr. 4/100-07). He had not been provided a copy of the drawing of the crushing machine and screening plant prepared by Mr. Stuttmann and furnished by Fa. HAZEMAG to the Government. Based on his computations of the data specified for the performance requirements for output capacity in tons per hour (10 to 25), inlet material and inlet size (0 to 150 mm), end output size (0 to 50 mm), and applying standard industry formulae and design guidelines, he designed a coal crushing and screening plant that he believed satisfied the performance requirements of the specifications. He then submitted these detailed specifications he had developed to appellant (ex. G-7; tr. 4/119-20). Neither BWM nor appellant informed the Government prior to bid opening that they believed the specifications issued with the IFB to be defective and that they had not received drawings or sufficient details to determine how the components should be arranged in the machine (tr. 1/68-70, 2/132-35, 4/77-78, 96-99, 5/72).

19. The detailed specification prepared by BWM contained the same performance requirements specified in the specifications prepared by Fa. HAZEMAG, which were

contained in the IFB (R4, tabs 1, 76; ex. G-7). However, the dimensions for the coal crushing and screening machine platform differed between the BWM and HAZEMAG specifications. The dimensions of the various components, such as conveyor belts, cylinder double roller crusher, and screening component also differed between the two specifications prepared by BWM and Fa. HAZEMAG. Whereas the Fa. HAZEMAG specifications prepared by Mr. Stuttmann required a double rolling mill type: WM-L 0810, with a cylinder diameter of 800 mm, and width of 1,000 mm, BWM proposed a double roller breaker, type ZWB 0606, with a roller diameter of 650 mm and roller width of 650 mm. Each of the double roller breakers or crushers were product lines of the respective manufacturers (finding 4; R4, tab 17; ex. A-4; tr. 5/64-65). Whereas the specifications prepared by Mr. Stuttmann called for a 5.5 kW motor, BWM proposed a 4.0 kW motor (exs. G-1, G-7).

20. Appellant delivered its "bid" to RCO Seckenheim, depositing it in the bid box, on 3 February 1994, the day before the bid opening date (R4, tabs 1, 76; ex. A-4; tr. 4/13-20). Appellant's bid was dated 1 February 1994 and contained the IFB, with appellant's signature and bid price. The IFB provided in section B that the U.S. Government was exempt from the 15 percent value added tax under the U.S.-German Tax Agreement. Appellant bid a firm, fixed-price amount of DM 675,000, and there was no evidence in the bid that it included this tax in its bid price. Notwithstanding the appellant's testimony that it included the value added tax or that it was not aware that the U.S. Government was exempt from this tax, the bid was regular in this regard (tr. 3/119-20, 4/35). According to appellant's sales manager, he deposited appellant's bid, which included the IFB and signed bid, the specifications prepared by BWM and retyped on appellant's letterhead stationery addressed to RCO Seckenheim, and a BWM brochure describing the coal crushing machine, in a standard ABS business envelope with the ABS logo and address on the envelope and typed address of RCO Seckenheim (R4, tabs 1, 76; exs. A-4, A-6; tr. 3/116-18, 4/13-20, 72-74). The detailed specifications prepared by BWM were dated 31 January 1994.

21. Bid opening was held on 4 February 1994 at approximately 2:00 PM at the RCO Seckenheim (R4, tab 5; tr. 1/210, 220-22, 225-29). The bids were recorded, and nothing unusual, such as an alternative bid, was noted with respect to either appellant's bid or the bid from Fa. Noell. Since 4 February 1994 was Friday, the bids were retained in a file drawer over the weekend, and evaluated on Monday, 7 February 1994 (tr. 2/106, 117-20, 135). Neither the contract specialist evaluating the bids nor the contracting officer noted anything unusual about appellant's bid, specifically the presence of the alternative specifications and BWM brochure.[3]

The Contract

22. The Government awarded a firm, fixed-price contract to appellant, as lowest "responsive" bidder on 11 February 1994 (R4, tab 1). The contract award stated in block 15, "Your offer, dtd, 01 Feb 94 in response to the solicitation # DAJA02-94-B-0032 is hereby accepted and made part hereof." The contract price was DM 675,000. It was unclear why the contracting officer used the Award/Contract, Standard Form 26, with this language incorporating appellant's offer, rather than simply executing the Award portion of the Solicitation, Offer and Award, Standard Form 33, which was used for the solicitation and signed by appellant when it returned the bid, and why he specifically accepted and incorporated appellant's offer. The contract, like the IFB, identified only nine pages each for the English language and German language versions of the specifications, without reference to any additional pages and to the drawing (R4, tabs 1, 4; ex. G-6). Pages appeared to be missing from all copies of the IFB, the contract, and appellant's bid. The contract clause, DFAR 52.211-7000, TERMINATION – COMMERCIAL ITEMS (MAY 1991) was included in the contract. However, a page missing from this clause appears to include the portion of the clause dealing with default termination.

23. The contract contained a number of clauses that appeared to be standard clauses for commercial items although they were not contained in FAR Part 52. These included: CHANGES – COMMERCIAL ITEMS (DFAR 52.211-7000, MAY 1991); INSPECTION AND ACCEPTANCE – COMMERCIAL ITEMS (DFAR 52-211-7004, MAY 1991); ORDER OF PRECEDENCE (DFAR 52.215-0033, JAN. 1986); INCONSISTENCY BETWEEN ENGLISH AND TRANSLATION OF CONTRACT (DFAR 52.225-0014, AUG. 1989); and DISPUTES (DFAR 52.233-0001, DEC. 1991). The contract did not include the BRAND NAME OR EQUAL (DFAR 252.210-7000, DEC. 1991) clause, which although the text was included, was marked as DELETED. Section C of the contract contained A BRAND NAME OR EQUAL ITEM provision which required a bidder to set forth the brand name and make or model of any "equal" product offered, which was also specifically deleted.

24. The contract specifications, which had been prepared by Fa. HAZEMAG and modified in the English version by the Government by the addition of an added provision for inspection and acceptance and SPECIAL CONDITIONS, included paragraph 2.18, which provided, in part:

> Inspection and acceptance of the delivered plant and construction will be performed by the COR.
>
> a. Performance and material quality will be inspected.
>
> b. Velocity with rated load will be inspected.

(R4, tab 1) Included in the SPECIAL CONDITIONS were the following provisions:

> 3.1 Performance Standards:
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> All material and performance of work listed in this specification shall be in accordance with applicable German standards and regulations, with safety regulations regarding the prevention of accidents (UVV).
>
> . . . .
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> 3.7 Tests:
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> After the installation is completed and before the system is put into operation, the contractor shall conduct tests to detect deficiencies. Tests conducted in the presence of an [sic] Government representative for demonstration of satisfactory functional and operating efficiency shall be prerequisite for final acceptance of the work.

(R4, tab 1) In addition to the format differences between the English and "courtesy translation" German versions of the specifications, neither the German language specifications in the IFB nor in the resultant contract contained the added paragraphs 2.18 and 3.1 through 3.8.

Post-Award Performance and Termination

25. Shortly after the Government awarded the contract to appellant, it mailed a copy of the contract to appellant (tr. 2/126). The contract, as mailed to appellant, did not contain the ABS offer which, according to appellant, had been attached to appellant's bid (Finding 20, tr. 4/20-21). However, appellant believed that the contract was awarded on the basis of appellant's proposal, including the BWM specifications (tr. 3/139-40). Appellant did not think that the absence of its proposed specifications was unusual because it did not expect to receive the BWM specification contained in appellant's offer and because it believed that in accordance with the normal practice in Germany, it would not have received the copy of this specification (tr. 4/20-21). Appellant informed BWM that the Government had awarded the contract and BMW confirmed its prior proposal with the previously submitted specifications and price in a written contract (R4, tab 79; tr. 3/120-21, 4/22-26).

26. Appellant's representative contacted Government representatives at the RCO Seckenheim and was contacted by Mr. von Dungen and Mr. Keller of the Rheinau Coal Yard to arrange a meeting to clarify some of the matters in the specifications (tr. 1/65-66,

4/26-27). According to Mr. von Dungen, the meeting was necessary because the managers of the coal yard "were of the opinion that such a complex machine (which is only assembled based upon customer request/contract) requires technical coordination between manufacturer and customer," and because certain aspects of the specifications were not clear and could give rise to questions about how the machine should be manufactured (R4, tab 37; tr. 1/65-66). Mr. von Dungen asked appellant to bring a copy of its drawings and specifications, and the list of parts it was going to deliver as part of the plant.

27. In response to the Government's request, appellant submitted the same specification and list of parts to the managers at Rheinau Coal Yard during a meeting on 14 April that it believed that it had submitted with its bid (R4, tab 6; tr. 1/68-71, 3/146-48, 4/27-29). In a 15 April 1994 memorandum to the contracting officer, Mr. von Dungen stated that the machine appellant proposed to supply differed in a number of respects from that specified by Fa. HAZEMAG in the specifications it provided for the Government (R4, tab 6). These discrepancies included: appellant's proposed use of skids instead of the specified wheels; appellant's proposed delivery of a breaker with a cylinder diameter/width of 650 mm rather than the specified roller breaker type WM-L 0810, which had a specified cylinder diameter of 800 mm and cylinder width of 1,000 mm; appellant's proposed steel mainframe length of 5,800 mm and width of 2,400 mm, instead of the specified length of 12,000 mm and width of 3,000 mm; appellant's proposed conveyor belt with a length of 10,000 mm and width of 650 mm instead of the specified 15,000 mm length and 800 mm width; appellant's proposed delivery of a smaller motor with 4.0 kW power capacity instead of the specified motor with a 5.5 kW power capacity; appellant's proposed screening machine with a width of 1,200 mm and length of 2,000 mm, instead of the specified width of 1,000 mm and length of 3,000 mm; appellant's proposed conveyor belt with a width of 650 mm and length of 7,000 mm, rather than the specified width of 800 mm and length of 5,000 mm; and the absence of two additional conveyor belt in appellant's design that were included in the HAZEMAG prepared specifications. According to this memorandum, appellant had offered to provide the equipment called for in the Government solicitation without any changes, and now advised the Government that it was delivering a machine significantly different than what was specified in the contract. During this meeting of 14 April 1994, appellant offered to provide the plant with wheels rather than the originally proposed skids, and proposed to provide the 5.5 kW motor rather than the originally proposed 4 kW motor (R4, tab 6; tr. 1/71, 133). Mr. von Dungen requested the contracting officer to take immediate action to require appellant to provide the equipment as offered and solicited, or be terminated for default. There is no evidence that Mr. von Dungen reviewed or saw appellant's bid prior to the award of the contract. He further stated that the Government could not accept a non-conforming plant, even with a price reduction. Mr. von Dungen simply assumed that appellant's proposed crushing machine and screening plant would not satisfy the performance requirements of the contract specifications.

28. By letter dated 19 April 1994, the contracting officer informed appellant that the component list appellant delivered the Government described a coal crushing machine and screening plant that was not in accordance with the contract specifications, and as such, would not be accepted (R4, tab 7). The contracting officer set out the deficiencies identified in the memorandum from Mr. von Dungen (finding 27). The contracting officer further informed appellant that it must strictly comply with the contract terms and specifications, including the delivery date, and that failure to comply, and to answer the contracting officer's letter by 29 April 1994 could result in the Government's terminating the contract for default. Accordingly, the contracting officer advised appellant to contact Mr. Keller at the Rheinau Coal Yard, to provide him shop drawing and discuss the technical requirements of the contract with him.

29. Appellant responded to the contracting officer by letter dated 27 April 1994 (R4, tab 8). In this letter, appellant stated that it would contact Mr. Keller and proposed a 2 May 1994 date for a meeting, after which it would contact the contracting officer.

30. Appellant's representatives, including Dr. Walter from BWM, met with Mr. von Dungen, Mr. Keller, and a contract specialist from RCO Seckenheim at the Rheinau Coal Yard on 2 May 1994 (R4, tab 9; tr. 1/71-72, 1/133, 4/29-31, 65-66). Appellant explained to the Government that it had submitted an alternative specification to the Government with its bid, and that since the Government had awarded the contract to appellant, it had assumed that its proposed specifications had been acceptable to the Government. According to the memorandum for record of this meeting, the contract files contained no such alternative specifications from appellant (R4, tab 9). Whether appellant was mistaken as to whether it included the alternative specification in its bid package responding to the IFB, or the Government, through possible mishandling of the bids prior to the scheduled bid opening or over the weekend between the bid opening on Friday and their evaluation on Monday, misplaced the alternate specifications is not clearly established by the record (findings 20-21, 25). Nevertheless, we find on the basis of the entire record, including the events following the award of the contract, that a preponderance of the evidence indicates that appellant's bid did not, at the time of evaluation of the bids, include its alternative specifications and brochure. We further find that the contracting officer based the award on the IFB and the bid submitted by appellant without the alternative specifications and brochure.

31. Throughout the meeting, appellant indicated its willingness to comply with the Government's specifications, but also informed the Government that since the production of the plant had already commenced, the funnel size and the cylinder width could no longer be changed. Appellant offered a price reduction in consideration for the smaller cylinder and funnel. Either during this meeting or shortly thereafter, appellant and the Government once again agreed on the diesel generator and motor and on the changes

from skids to wheels. In an internal memorandum of 3 May 1994 reporting on this meeting, the principal reasons for rejecting appellant's proposal were that the smaller crusher would produce a larger quantity of unusable undercorn, and the fact that the machine would have to be run to the limits of its capacity thereby shortening its useful life (R4, tab 9).

32. Appellant wrote the contracting officer on 22 May 1994 contending, in part, that the detailed specifications in the IFB were proprietary and based on a known product which was not identified in the contract (R4, tab 14). According to appellant, the detailed description of the components of a coal crushing machine and screening plant of a known manufacturer was issued as the Government specification. The manufacturer was not identified and the contract contained no BRAND NAME OR EQUAL clause or provisions.

33. Upon the contracting officer's receipt of appellant's letter of 22 May 1994, she began formal inquiries, including by memorandum dated 26 May 1994 to Mr. Keller, concerning the technical issue addressed in appellant's letter, particularly with regard to the alleged proprietary nature of the specifications and the absence of any BRAND NAME OR EQUAL clause or provisions in the contract (R4, tab 16; tr. 3/11-17). In her memorandum to Mr. Keller, she requested that he provide a detailed explanation concerning the salient characteristics of the Government's required coal crushing and screening plant alleged to be proprietary, and the salient differences between the plant described in the specifications and the plant appellant was requesting the Government to accept. She met with Mr. von Dungen, Mr. Keller, and Maj. James Mandziara, the Director of Operations for Defense Fuel Region, Europe, Defense Fuel Supply Center, and asked pointed questions about how the specifications were prepared, and was told, incorrectly, by them that the specifications were drafted by Mr. von Dungen and Mr. Keller from market surveys and brochures submitted by people in the trade.

34. Mr. von Dungen responded to the contracting officer's request of 26 May 1994, by memorandum dated 3 June 1994 (R4, tab 18; tr. 1/72-83). In his memorandum, Mr. von Dungen outlined his concerns with appellant's proposed crusher and screening plant, principally addressing the dimensions of the double rolling breaker, the screening machine, and the conveyor belts. He further stated that the specified crushing and screening capacity up to 25 tons per hour was considered mission essential, and stated that appellant's proposed machine would produce a capacity of 10 to 15 tons per hour, which would not allow the coal yard to meet its annual crushing requirement during the limited period it had to complete the crushing of its coal stockpile. According to Mr. von Dungen's memorandum, appellant's smaller double roller breaker would have to operate at a higher speed than the specified roller breaker in order to produce the required capacity, and that this would reduce the lifetime of the breaker and cause the large pieces of coal to "dance" on the top of the cylinders. However, he was simply mistaken about the capacity of appellant's proposed crushing and screening plant, since appellant's

proposed plant provided for a capacity of 10 to 25 tons per hour, which was what was required by the specifications (R4, tabs 76, 79; ex. A-4; tr. 4/124-32).

35. In his memorandum to the contracting officer, Mr. von Dungen stated that the motors to be delivered under paragraphs 2.8, 2.11, 1.13, and 2.14 of the specifications must have a capacity of 5.5 kW in order to carry the maximum output of the specified breaker (R4, tab 18). Paragraph 2.8 of the specifications provided the dimensions, axles' distance, gradient, and belt speed of the "conveyor belt to the rolling breaker and to the screening machine," and provided in pertinent part that the "drive shall be through a [sic] electro-food-motor 5.5 kW with second switched v-belt drive." However, in a meeting on 14 April 1994 with Mr. von Dungen, appellant had offered to provide the 5.5 kW motor specified in the specifications (R4, tab 6; tr. 1/71, 133). Mr. von Dungen discussed appellant's specifications and his opinion with regard to the crushing capacity of the machine appellant had proposed to deliver with Mr. Stuttmann of Fa. HAZEMAG, who confirmed that the machine's useful life could be reduced by the need to run the machine faster than it was designed to run (tr. 1/113-16). Although appellant had agreed to deliver a mobile unit with wheels, rather than skids as it had originally proposed, Mr. von Dungen rejected the use of skids, and explained why the platform with integrated wheels were essential and critical to the use of the coal crushing machine and screening plant (findings 27, 31; R4, tabs 6, 18; tr. 1/71, 133).

36. Mr. von Dungen did not address the contracting officer's question about the proprietary nature of the specifications. However, in the concluding paragraph of his 3 June 1994 memorandum to the contracting officer, he wrote:

> Furthermore, the plant's major components such as breaker, screening machine, conveyor belts, and motors are standard industry shelf items. The plant in its entirety is assembled based on customer needs/specification but can be performed by any company with welding/electrical experience. According to Industry and our knowledge, plants of the size we have specified or larger/smaller are non-shelf items and are always and exclusively manufactured/assembled based on customer request/contract.

(R4, tab 18)

37. There was no evidence to support this conclusion. First, the specified roller breaker included in the design prepared by Mr. Stuttmann of Fa. HAZEMAG, was not a standard industry shelf item (findings 6, 19). Rather, according to a general engineer at USAEUR Contracting Center, this was not an industry standard item, but was the name of a particular manufacturer's product (R4, tab 18). Second, according to Mr. Stuttmann,

during his pre-design discussions with Mr. von Dungen and Mr. Keller, Mr. von Dungen and Mr. Keller did not request that the design include specific sizes of the particular components for the coal crushing machine and screening plant (tr. 2/21-22). They simply requested a design that would meet certain performance characteristics. The only data, if any, provided by Mr. von Dungen to Mr. Stuttmann may have been the performance data contained on the second page of the specification which were based on Mr. von Dungen's discussions with Mr. Stuttmann (R4, tab 65; ex. A-2; tr. 2/60, 62). Mr. Stuttmann then used standard industry formulae and computations in a computer software program developed by Fa. HAZEMAG to select the type and size of roller crusher from Fa. HAZEMAG's product line (R4, tab 95; tr. 2/22-31, 51-59). Fa. HAZEMAG designed all the other parts and components of the plant, such as the screen, the sieve, the various conveyor belts, the power supply, the seal construction, all of which were independently calculated by Mr. Stuttmann in order to assure the functionality of the machine. Although he provided the basic calculations for the roller crusher to Mr. von Dungen in response to his request, he did not provide the calculations with respect to the component elements, including those furnished by Fa. Haverand Boecker regarding the screening system which was manufactured by Fa. Haverand Boecker (tr. 2/87-89).

38. By letter, dated 14 June 1994, the contracting officer issued a Cure Notice to appellant (R4, tab 20). She simply repeated the claims of nonconformity with respect to the dimensions of the component parts of the plant and appellant's initially proposed use of skids instead of wheels, as set forth in Mr. von Dungen's memorandum of 3 June 1994 to her. She relied exclusively on what Mr. von Dungen and Mr. Keller had told her (tr. 3/17-18). She did not address appellant's assertion in its letter of 22 May 1994 concerning the proprietary nature of the specifications, nor did she acknowledge the fact that appellant had agreed to incorporate wheels into the design of the plant rather than skids as proposed initially.

39. On 16 June 1994, appellant attempted to deliver equipment and parts for the complete installation of the coal crushing machine and screening plant (R4, tabs 19, 20, 22; tr. 1/86). Mr. Keller inspected the contents of trucks on which the equipment and parts were loaded, measured two conveyor belts and the screening machine, and determined that the dimensions of these items did not conform to the contractually specified dimensions. Accordingly, he refused to allow appellant to enter the Coal Yard to off-load and deliver the components for assembly and testing (R4, tab 22; tr. 1/86-88, 165-67).

40. Appellant responded to the contracting officer's Cure Notice on 14 July 1994 (R4, tab 24). Once again, appellant raised the issue of the proprietary nature of the specifications because of their detail which, according to appellant, reflected the proprietary characteristics of a particular, but unnamed coal crushing plant, and asserted that, therefore, a "brand name or equal" analysis was required, which focused on the

salient characteristics of the product specified in the specifications. Appellant repeated from its earlier letter of 22 May 1994, what it considered to be the salient characteristics of the coal crushing plant, namely: semi-mobility; coal crushing capacity of 10 to 25 tons per hour, accommodating U.S. anthracite coal at inlet sizes of 0 to 150 mm (with single pieces up to 200 mm), and producing an end product of 0 to 50 mm, using a control screening process whereby oversize coal in excess of 50 mm is loaded by a scoop loader into the funnel; and a diesel electric machine operated with a diesel power supply aggregate of 113 KVA permanent operation. Appellant stated that it had offered, and was prepared to deliver a coal crushing plant that met and exceeded each of these salient characteristics. Appellant specifically addressed each of the dimensions of the component parts of its proposed coal crushing plant alleged by the contracting officer to be nonconforming, affirming that each of those components were specifically designed and built to meet the performance salient characteristics of the specified coal crushing and screening plant. According to the Government, the contractually specified dimensions of the individual components of the coal crushing machine were simply required to fit the specified double roller breaker (tr. 1/79-83, 118-26, 156-62).

41. In addition to the foregoing, appellant stated that the basic elements of contract formation could not be overlooked (R4, tab 24). Specifically, appellant asserted that its offer in response to the Government's solicitation included detailed specifications of the semi-mobile coal crushing machine submitted by ABS on its letterhead stationery, which the Government accepted when it awarded the contract to appellant on 11 February 1994. It was the same semi-mobile crushing machine which appellant attempted to deliver and which appellant was then ready to deliver. Accordingly, appellant stated that it had addressed all the matters and issues raised in the Cure Notice, and requested a meeting to answer any further questions the Government might have with respect to any explanation contained in appellant's response to the Cure Notice or to any other points not raised in the Cure Notice.

42. Mr. von Dungen and Mr. Keller met with the contracting officer and members of her contracting staff on 4 August 1994 to discuss appellant's response to the Cure Notice (R4, tab 26). According to the memorandum for record of this meeting, when the issue of the possible proprietary nature of the specifications was addressed, Mr. Keller told the contracting officer that the specifications had been prepared on the basis of the brochures from different possible sources for the coal crushing and screening plant that he had received from his market survey to determine what was available on the market. He further represented that "since all coal crushers are standardized and meet the Government's needs," he "did not cite a brand name and prepared the design on the salient features required to get a maximum competition." As we found above, this simply is not true (findings 2-10, 14, 19). Furthermore, neither Mr. Keller nor Mr. von Dungen told the contracting officer that they had conversations with Fa. HAZEMAG in connection with the generation of the specifications or that Fa. HAZEMAG had in fact

furnished the specifications (tr. 3/40-41). The memorandum for record of this meeting further stated that the machine proposed by appellant would not produce the capacity required by the specifications unless it was operated at its limits, which would then produce higher wear and tear on the machine, that it would not produce the required output size in the right time, and that it would produce a higher quantity of unusable undersize coal fragments and fines, which could considerably burden Government resources. The conclusion reached at this meeting was that there were no facts proved regarding the capacity and operation of the coal crushing machine offered by appellant, and that appellant had breached its contract. Accordingly, the decision was made to issue a Show Cause notice to appellant.

43. Based on the information Mr. von Dungen and Mr. Keller provided her during the 4 August 1994 meeting, the contracting officer issued a Show Cause notice to appellant (R4, tab 28). She stated that appellant's response of 14 July 1994 did not constitute a cure of the specified deficiencies cited in her previous Cure Notice of 14 June 1994, and that the coal crushing and screening plant appellant intended to deliver did not meet the contract specifications, which described the Government's minimum needs. According to the contracting officer, even though appellant had identified certain aspects of the specifications which were met by appellant's proposed product, these did not provide the required performance of the system, and all the component products specified must be present and interact to produce the required results efficiently. She then stated that the Government was considering terminating the contract for default and gave appellant 10 days to respond to the Show Cause notice.

44. Following an exchange of correspondence between the parties, the parties met on 1 September 1994 to discuss the technical issues addressed in the contracting officer's Cure Notice and Show Cause notice (R4, tabs 29-34, 93; tr. 1/84-86, 3/68-77, 81-83, 5/25-27, 42-47, 120-26, 133-40). At the beginning of the meeting, the contracting officer stated that the purpose of the meeting was not to be construed as technical discussions establishing or deciding any disputes, providing any interpretation or defense of the Government's specifications, "or for providing the basis on which the Government's specification were developed." (R4, tab 33) Rather, the purpose was merely to afford appellant the opportunity to present any additional technical information to the Government's technical representatives to be considered in the Government's decision on whether to terminate the contract for default.

45. During the meeting, Dr. Walter of BWM presented his analysis of the specifications prepared by Fa. HAZEMAG, which were contained in the IFB, how he came to the conclusion that if BWM manufactured the machine in accordance with the detailed description and dimensions of the component elements of the coal crushing and screening plant as set forth in the specifications in the IFB, the machine would not satisfy the performance requirements specified on the second page of those specifications (R4,

tabs 34, 35, 93; tr. 1/175-81, 2/22-26, 68-77, 81-83, 5/19-22, 25-27, 42-51). During this meeting, Dr. Walter presented his computations, which were based on standard industry mathematical formulae, in support of his position that the specifications in the IFB were defective and that the machine BWM proposed to provide would satisfy the performance requirements specified on page two of the specifications (R4, tabs 78, 95). Dr. Walter did this by inputting the specified dimensions into the industry-norms standard formula which calculates the output attainable based input sizes of coal, the desired output sizes of coal, and the specified coal crusher dimensions. As reflected by these calculations, the resulting output capacity resulting from inputting the specified dimensions in the formula would not achieve the output capacity specified in the IFB specifications. Moreover, some of the components specified in the specification would not fit with other component requirements. The specifications in the IFB did not indicate or specify how the various components of the machine should be arranged since no drawing had been provided or identified in the IFB or specification, and although five conveyor belts were specified, this was an unnecessary redundancy for the performance of two of the conveyor belts with respect to output of undersized coal. As a result, appellant contended that the fifth conveyor belt was unnecessary. During this meeting, Mr. von Dungen did not show appellant the drawing prepared by Mr. Stuttmann of Fa. HAZEMAG, which for unexplained reasons had been omitted from the IFB (findings 9, 13, 18), and did not explain where the fifth conveyor belt was to be installed in the machine.

46. Based on its analysis of the performance requirements of the specifications in the IFB, Dr. Walter then demonstrated on the basis of this mathematical formula how the machine he had designed in response to the IFB would satisfy the performance requirements specified on page two of the IFB specifications. According to these computations, the BWM designed coal crushing and screening plant would achieve an output capacity of 44.7 metric tons per hour with the same density of material as used by Fa. HAZEMAG in its calculation (R4, tab 95), an inlet size of coal of 0-150 mm (single pieces up to 200 mm), an outlet size of less than 50 mm with material, with the least amount of end product smaller than 20 mm as fines and undersize coal falling through the screen for removal (R4, tab 78, tr. 5/35-57, 76-85). Dr. Walter concluded on the basis of the mathematical formula that a 650 by 650 mm crusher, a distance of 33 mm between rollers, a roller speed of 3.2 meters per second, a conveyor belt width of 650 mm, and a screen width of 1,200 mm and length of 2,500 mm would achieve these performance requirements. The dimensions of the width of the conveyor belt and length of screen were similar to those proposed by Fa. HAZEMAG in its bid and which were approved by Mr. von Dungen and Mr. Keller approximately one week prior to bid opening (findings 14, 16).

47. Dr. Walter once again offered during this meeting to deliver a machine for testing at no expense to the Government (tr. 1/168-70). However, Mr. von Dungen rejected this offer, in part because he believed that he could not test the machine because

it was never delivered as a conforming item in accordance with the specifications, and because he had been instructed by the contracting officer that under no circumstances would a test be permitted. The contracting officer had previously during appellant's attempted delivery of the equipment and components of the coal crushing and screening machine prohibited the attempted delivery and testing of the machine on the basis that she was informed by her technical advisors that the components were in total noncompliance with the specifications, and because she believed that to allow such testing would constitute partial acceptance and impair the Government's position that appellant's equipment and components were not in compliance with the contract (tr. 3/10-11). The proffered machine was never tested in accordance with paragraphs 2.18 and 3.7 of the specifications (tr. 1/170).

48. Immediately following the Government's meeting with appellant's and BWM's representatives, the Government held an internal meeting to discuss possible conclusions from appellant's presentation (R4, tab 34). Neither the contracting officer nor Mr. von Dungen fully understood the technical nature of Dr. Walter's computations and conclusions (tr. 1/182-83, 3/28-30, 68-77). Notwithstanding this, both the Government's technical and contracting office representatives concluded that appellant had not presented anything that would alter the Government's position that the Government's specifications were valid and non-deficient, and that appellant's proposed machine would not satisfy the Government's minimum requirements. Mr. von Dungen had not completely understood Dr. Walter's explanation concerning the defective nature of the specifications in the IFB and did not believe Dr. Walter's explanation was valid (tr. 1/178-81). He, therefore, discussed his understanding of Dr. Walter's position with Mr. Stuttmann, and forwarded Dr. Walter's computations to Mr. Stuttmann for review and advice as to the correctness of Dr. Walter's drawings and conclusions (R4, tab 78; tr. 1/115-16, 182-87). Mr. Stuttmann confirmed that Dr. Walter's computations were correct, thereby confirming Dr. Walter's argument that the appellant's coal crushing and screening plant would meet the functional and performance requirements of the specifications. Since the Government refused to test its proffered coal crushing and screening plant in accordance with the contract's SPECIAL CONDITIONS, paragraph 2.18 and paragraphs 3.1 and 3.7, and declined appellant's offer to deliver the machine for testing at no expense to the Government (findings 24, 38, 47), there was no persuasive evidence that appellant's proffered machine would not satisfy the performance requirements of the contract. Indeed, we find on the basis of the record, and specifically including the mathematical analysis of the specifications prepared by appellant, that its proffered coal crushing and screening plant would have met all of the performance requirements specified on page two of the Government's specifications.

49. We further find that the specifications prepared by Fa. HAZEMAG, and issued by the Government in the IFB were defective in the following respects: First, the components' dimensions were based on a Fa. HAZEMAG product line item, and related

specifically to the brand name proprietary roller crusher, WM-L 0810, a mill, which was mistakenly included in the specifications, rather than a roller breaker, and on a Fa. Haverand Boecker screening plant. Second, the IFB did not contain the drawing that depicted the required arrangement and assembly of components. Third, a machine manufactured and assembled in strict compliance with the specification contained in the IFB would not, according to standard industry mathematical formulae, have met the performance requirements specified in those specifications (finding 45).

50. Mr. von Dungen spoke frequently with Mr. Stuttmann throughout the Government's dealings with appellant concerning its proposed coal crushing and screening plant, particularly during the period Mr. von Dungen was recommending termination of the contract for default (tr. 1/156-62, 178, 182-83, 185, 2/34-36, 46-49). These contacts included forwarding to Mr. Stuttmann the drawings prepared by BWM for its proposed machine, and Dr. Walter's computations and seeking Mr. Stuttmann's advice as to whether the BWM machine would be able to produce the 25 tons per hour output. According to Mr. von Dungen, Mr. Stuttmann initially told him that the machine would not produce this output and that the screening efficiency was less than the Government wanted. Mr. Stuttmann, however, did not give him the rationale for his conclusion. Mr. Stuttmann testified that comparing the BWM proposed machine with the Fa. HAZEMAG proposed machine, the HAZEMAG machine would have a longer life usefulness (tr. 2/49). There was no reference in the specifications or contract specifying the life of the machine, nor was there any persuasive evidence that any HAZEMAG machine that may have been manufactured to its own specifications would have produced a longer life usefulness than the machine manufactured by BWM.

51. Notwithstanding Mr. von Dungen's and Mr. Keller's frequent contacts with Mr. Stuttmann, both before and after the award of the contract, neither Mr. von Dungen nor Mr. Keller informed the contracting officer of their relationship with Mr. Stuttmann (tr. 1/174-87, 2/135-40, 3/14-15, 36-42, 55-56). They had not told the contracting officer that the specifications and estimate had been prepared by Mr. Stuttmann and Fa. HAZEMAG. They had not told the contracting officer that they had received Mr. Stuttmann's proposed changes to the design following the issuance of the IFB and prior to the submission of the bids, and had approved them. They did not inform the contracting officer that they forwarded to Mr. Stuttmann, the BWM drawings and computations, and had solicited and received advice from Mr. Stuttmann concerning appellant's proposed machine design. They did not inform the contracting officer that Mr. Stuttmann had agreed with the correctness of Dr. Walter's computations, thereby confirming that the appellant's machine would satisfy the performance requirements of the specifications.

52. By letter dated 6 September 1994, appellant responded to the contracting officer's Show Cause notice (R4, tab 35). This letter provided a written summary of what

appellant presented in the meeting of 1 September 1994. The thrust of this response was that a machine manufactured in accordance with the specifications, with the components dimensioned as specified, would not efficiently produce the performance requirements set forth on page two of the specifications, and that the machine which appellant designed and proposed to have tested would satisfy, and indeed exceed, those specified performance requirements. Appellant further repeated its earlier offer to deliver the coal crushing machine with wheels rather than skids and with the motor with increased power, and to test the coal crushing machine to the specified performance requirements in accordance with paragraph 3.7 of the specifications without any obligation on the part of the Government. Appellant also addressed the Government's contention that it had not received appellant's originally proposed design with the bid.

53. In letters dated 9 September 1994 and 14 September 1994, Mr. von Dungen and Maj. Mandziara, respectively recommended that the contracting officer terminate the contract for default (R4, tabs 38, 39). The essence of these letters was that the specifications, as issued with the IFB, were not defective, that appellant's proposed coal crushing and screening plant was nonconforming, and that appellant had, from the beginning, demonstrated an unwillingness to produce and deliver a product that met the specifications. Maj. Mandziara did acknowledge that the Defense Fuel Region, Europe was reevaluating its need for a coal crusher. However, the contracting officer did not notice this acknowledgment, nor did she take special note of that sentence (tr. 3/31, 34). Mr. von Dungen in a memorandum to Maj. Mandziara on 21 September 1994, questioned the need for a coal crusher in light of revised stockpile projections (R4, tab 94). Based on these revised projections and negotiations with the Air Force concerning utilization of anthracite coal, his office determined that there was no further need for a coal crusher (tr. 1/150-53). The contracting officer never saw this memorandum and was not aware of its contents (tr. 3/32, 34). However, at the hearing, she testified that she now saw the significance of Maj. Mandziara's comment in his memorandum of 14 September 1994 to her, and of Mr. von Dungen's memorandum of 21 September 1994 (tr. 3/32).

54. The contracting officer issued her final decision terminating the contract for default on 23 September 1994 on the grounds that appellant had failed to deliver a coal crushing plant the met the contract specification within the contractually required delivery time (R4, tab 39). According to her final decision, appellant had been given the opportunity to cure the alleged deficiencies, but did not do so. Since the coal crushing plant offered by appellant deviated from the specifications, and no deviation was permitted within the terms of the contract, appellant's right to proceed further was terminated.

55. There was no evidence in the record that the contracting officer seriously or adequately considered the factors identified in FAR 49.402-3(f), as required in determining whether to terminate a contract for default. There were no memoranda in the

record setting out her justification for the termination. At the time she made her decision to terminate the contract for default, she thought that there was still an urgent need for the coal crushing machine and screening plant and that there was a time factor involved because the Government was running out of time within which to accomplish the mission for which the crushing of the stockpile was required (tr. 3/32-34). Indeed, she was considering reprocurement, which was recommended by both Mr. von Dungen and Maj. Mandziara, notwithstanding the fact that they were reevaluating the need for the coal crusher (R4, tabs 37, 38). Mr. von Dungen had already determined that there was no need for the coal crushing machine and screening plant, except for the possible crushing of coal that could be sold at a better retail value (R4, tab 94; tr. 1/150-54). She had not seen Mr. von Dungen's memorandum of 15 April 1994 outlining the alleged deficiencies in appellant's proposed machine and did not consider this memorandum in connection with her decision to terminate the contract (finding 27; tr. 3/36-45). She was under the impression that Messrs. von Dungen and Keller had designed the machine and selected the components, and defined the performance requirements. There is no evidence that she considered, or even knew, of the possible violations of applicable laws and regulations with regard to the relationship between Messrs. von Dungen and Keller and Fa. HAZEMAG's Mr. Stuttmann, and that the specification in the contract, as contained in the IFB, may have been proprietary and restrictive of competition (tr. 3/61-62). Since she admitted that she did not have the technical expertise to determine whether or not appellant's proposed machine would satisfy the performance requirements of the specifications, she relied on them for advice, without knowing the role of Mr. Stuttmann in drafting the specifications and advising Messrs. von Dungen and Keller concerning appellant's proposed machine, and that Fa. HAZEMAG, through Fa. Noell, had submitted a bid which incorporated some of the changes included in appellant's specifications (findings 14, 16, 48; tr. 3/43-50, 56).

56. Appellant timely appealed the contracting officer's decision terminating the contract for default.

DECISION

As stated in *McQuagge v. United States*, 197 F. Supp. 460, 461 (W.D. La. 1961), "[t]his case presents a disgusting example of bureaucratic incompetence, irresponsibility, negligence, and outright disdain for the Government's interests, in connection with" this DM 675,000 contract for a coal crushing and screening plant for the Rheinau Coal Yard, Germany. Indeed, as we said in *Darwin Construction Company, Inc.*, ASBCA No. 29340, 84-3 BCA ¶ 17,673 at 88,147:[4]

> In view of the developments at the hearing, the Board has made extensive findings of fact. In addition, this termination for default exudes an odor piscatorial. *Alinco Life*

Insurance Co. v. United States, 178 Ct. Cl. 813 at 823, 373 F.2d 336 at 341 (1967)

Default termination is a "drastic sanction," and should be imposed only on the basis of "good grounds and on solid evidence." *J.D. Hedin Construction Co. v. United States*, 187 Ct. Cl. 45, 57, 408 F.2d 424, 431 (1969); *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). Nevertheless, it is well settled that a contracting officer possess authority to terminate a contract, and under the proper circumstances is obligated to exercise his or her discretion in doing so. *Schlesinger v. United States*, 182 Ct. Cl. 571, 390 F.2d 702, 707-08 (1968). The Government bears the burden of proof, by a preponderance of evidence, to establish that the default termination was justified. *Lisbon Contractors, Inc. v. United States, supra*. That the contractor may be in technical default is not determinative to establish the propriety of the termination for default. *Walsky Construction Company*, ASBCA No. 41541, 94-1 BCA ¶ 26,264, *aff'd on recons.*, 94-2 BCA ¶ 26,698; *M.A. Santander Construction, Inc.*, ASBCA No. 35907, 91-3 BCA ¶ 24,050. The default clause does not require the Government to terminate on a finding of default, but gives the Government discretion to do so, and that discretion must be exercised reasonably. *Darwin Construction Company, Inc. v. United States*, 811 F.2d 593, 596 (Fed. Cir. 1987).

Appellant contends that it was not in default at the time of the termination. According to appellant, the specifications prepared by Fa. HAZEMAG and issued with the IFB were either performance specifications, or contained a mixture of performance and design specifications, in which the Government did not warrant the design portion of the specifications. Indeed, the design specifications were defective. Notwithstanding this, appellant intended to deliver a machine which met and exceeded the performance specifications. Appellant also argues, however, that if the Board were to hold that the specifications were design, and not performance, the Government breached its implied warranty of the accuracy and adequacy of the specifications and, therefore, cannot terminate the contract for default based on appellant's failure to follow precisely the dimensioning portions of the specifications.

Appellant further contends that even if the Board were to hold that appellant was in technical default, the contracting officer's termination of the contract was arbitrary and capricious based on the following factors. First, the close working relationship between the representatives of the Rheinau Coal Yard and representatives of Fa. Noell and its subsidiary, Fa. HAZEMAG, in the development of the specifications and in the administration of the contract to appellant, indicating a pre-disposition in favor of Fa. Noell. This led to the contracting officer's "technical advisors" conducting themselves in what could only be characterized as subjective bad faith, which was imputed to the contracting officer in making her decision to terminate the contract for default. In this regard, appellant asserts that the close collaboration between Mr. von Dungen and

Mr. Keller on the one hand, with Mr. Stuttmann of Fa. HAZEMAG constituted a violation of FAR 9.505-2 and an organizational "conflict of interest so patent that the Government cannot 'be assured of getting unbiased advice as to the content of the specification.' FAR 9-505-2." Second, there was no reasonable basis for the contracting officer's decision to terminate the contract because she relied on the alleged expertise of her technical advisors from the Rheinau Coal Yard, and as indicated by their reliance on the advice from Fa. HAZEMAG, something which they never disclosed to the contracting officer, the contracting officer did not consider the possibility that the specifications, as prepared by Fa. HAZEMAG, were impossible to perform and were, therefore, defective. Moreover, the Government never permitted the testing of the proffered machine from appellant to determine if it satisfied the performance requirements of the specification.

The Government, on the other hand, argues first that the contract was properly terminated for default. Notwithstanding its admission that the specifications were drafted by Mr. Stuttmann, and were incorporated into the IFB, the Government contends that four responsive bids were received which proves that there was adequate competition and that the specifications were not proprietary or improperly limiting in nature. According to the Government, although there was a potential for a conflict of interest, no actual conflict of interest arose because of the takeover of the Rheinau Coal Yard by the Defense Logistics Agency, the full and open competition by the IFB, and the disqualification of Fa. Noell from the competition. However, in this respect, the Government's argument goes beyond the record since none of the other bids was in the record for our consideration, and since Fa. Noell submitted a bid which proposed alternative dimensions for the components of the coal crushing and screening plant. Although we found that appellant had prepared its bid with alternative specifications, we were unable to find, based on the record, whether appellant submitted its alternative bid (findings 19-20, 30). The Government contends that the contract award was proper because the contracting officer did not see appellant's alternative offer, alleging that none had been submitted, and awarded the contract on the basis of the specifications contained in the IFB. The Government further argued that appellant failed to meet the dimensional requirements and the performance requirements specified in the solicitation, and as such, was in default.

In the alternative, the Government contends that the Board lacks jurisdiction because the contract is void *ab initio*. Although the Government contends that the potential conflict of interest did not arise as an actual conflict of interest affecting the solicitation and award, the conflict of interest rendered the purported contract void *ab initio* as a result of the close collaboration between the Government's representatives and Fa. HAZEMAG in the preparation of the specifications and the role of Fa. HAZEMAG in the preparation of the specifications, the drawing which was not contained in the IFB, the Government estimate which was, and in suggesting of changes to the specifications, changes that were not provided to other potential bidders. The Government further contends that the contract is void *ab initio* because of appellant's materially non-

responsive bid, a bid that the contracting officer had no authority to accept. In this respect, the Government argues that the Board should leave the parties where it found them.

The Government mischaracterizes the issue and confuses the differences between dismissal for lack of jurisdiction and dismissal for failure to state a claim upon which relief may be granted. As stated by the Court in *Gould, Inc. v. United States*, 67 F.3d 925, 929 (Fed. Cir. 1995), a "dismissal for lack of jurisdiction means that the subject-matter of the dispute is one the court is not empowered to hear and decide." A "dismissal for failure to state a claim, however, is a decision on the merits which focuses on whether the complaint contains allegations, that if proven, are sufficient to entitle a party to relief." *See also Conley v. Gibson*, 355 U.S. 41 (1957); *Bell v. Hood*, 327 U.S. 678, 682 (1946); *Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637 (Fed. Cir. 1989). The issue here is not jurisdictional, but whether ABS Baumaschinenvertrieb GmbH stated a claim upon which relief could be granted. There is no question that appellant bases its claim on an express contract, although it may have been tainted by irregularity, and on the Government's actions in terminating a contract that the Government believed at the time to be valid. The irregularity in this case, if there is one, turns on questions of fact and the terms of the contract in dispute.

Although the Government concedes that appellant is innocent regarding the conflict of interest with regard to Fa. HAZEMAG, the Government contends that it shared culpability in creating the other circumstances under which a contract could not be formed and under which the purported contract is void *ab initio*. According to the Government, these included appellant's failure to learn about U.S. procurement procedures and to fully understand the controlling English language version of the IFB; providing Dr. Walter only with the German language version of the specifications; appellant's failure to notify the Government that Dr. Walter had concluded that the specifications were defective; appellant's submission of an alternative bid and failing to clarify the nature of the contract awarded when appellant received the contract without the alternative specifications; and submitting a bid which included the value added tax for which the Government was exempt.

Appellant points out that the Government, in arguing that the contract was void *ab initio* focused only on the collaboration between the Government and Fa. HAZEMAG in the preparation of the specification, and not on the continued collaboration between Mr. von Dungen and Mr. Stuttmann leading to the contracting officer's decision to terminate the contract for default. Thus, appellant argues that the actual conflict of interest was the Government having a competing firm advising the contracting officer through Mr. von Dungen about the characteristics of the machine and whether or not it met the performance requirements of the contract, and ultimately whether the contract should be terminated for default. Appellant, therefore, argues that if the Board holds that

the contract is void *ab initio*, the proper remedy is not to leave the parties where they are, but to convert the termination for default to a termination of the contract for convenience.

The issue of whether or not the contract is void *ab initio*, arises out of three distinct factual issues in this case. The first was the conflict of interest with regard to the Government soliciting assistance from Fa. HAZEMAG, in the development of the project and preparation of specifications. The second was the submission of a possible nonresponsive bid by appellant and the award of the contract in the face of that nonresponsive bid. The third was the advisory role exercised by Fa. HAZEMAG at the request of the Government in the Government's decision to terminate the contract for default. Each of these also involved the Government's failure to comply with the statutory and regulatory requirements in the award and administration of this contract.

As stated in *American Telephone and Telegraph Company v. United States*, 177 F.3d 1368, 1375 (Fed. Cir. 1999):

> The invalidation of a contract after it has been fully performed is not favored. Precedent shows that those contracts that have been nullified, based on a failure to meet a statutory or regulatory requirement, are contracts that have not been substantially performed.

In *American Telephone and Telegraph Company v. United States*, the issue asserted as affecting the validity of the contract was the application of an appropriation limitation in § 8118 in the 1987 Defense Appropriation Act which prohibited the obligation or expenditure of funds (*i.e*. the award of certain fixed-price contracts) provided under the Act, unless certain specified conditions were met. The Court held that § 8118 applied to this contract, and that the requirements of § 8118 were not met. The Court held that:

> Legislative intent and precedent both lead to the conclusion that the AT & T contract was not void *ab initio* as a consequence of the agency's noncompliance. Invalidation of the contract is not a necessary consequence when a statute or regulation has been contravened, but must be considered in light of the statutory or regulatory purpose, with recognition of the strong policy of supporting the integrity of contracts made by and with the United States. In *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 81 S.Ct. 294, 5 L.Ed. 2d 268 (1961) [*rehearing denied*, 365 U.S. 855, 81 S.Ct. 798, 5 L.Ed 2d 820 (1961)], the Court explained that when a statute "does not specifically provide for the invalidation of contracts which are made in violation [of its

> provisions]" the court shall inquire "whether the sanction of nonenforcement is consistent with and essential to effectuating the public policy embodied in [the statute]"

Id. at 1374.

As we held in *EROS Division of Resource Recycling International, Inc.*, ASBCA Nos. 48355, 48773, 99-1 BCA ¶ 30,207 at 149,460, *aff'd.* by Fed. Cir. by Order dated 11 April 2000, citing *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 345, 356-57 (1997):

> The court held that the contracting officer had authority to award the contract; her failure to follow the statutory procedures did not mean that she lost her underlying authority; the agency did not lack appropriated funds for the contract; and the error did not harm the public interest, for whose protection the statute was enacted, because the illegality was not plain since all participants operated under the impression that the statute was inapplicable; and Cubic, which had reason to know the application of the statute before the solicitation was issued, did not assert timely the illegality of the solicitation.

Accordingly, we held that under these circumstances, the Government's procedural errors were not plain or palpable, the contract was not void *ab initio*, but was voidable.

In *United States v. Mississippi Valley Generating Co.*, *supra*, the conflict of interest arose largely out of the activities of a Mr. Wenzell, Vice President and Director of First Boston Corporation. At the suggestion of First Boston's Chairman and at the request of the U.S. Bureau of the Budget, Mr. Wenzell undertook to advise the Government and act on its behalf in negotiation of a contract between the Mississippi Valley Generating Company (MVG) and the Government for the construction and operation of a steam power plant in the Memphis, Tennessee area. Before the plant was constructed, but after MVG had taken steps toward performing the contract, the Government's Atomic Energy Commission (AEC) canceled the contract because the power to be generated by the plant was no longer needed. MVG sued the Government in the Court of Claims for sums it had expended in connection with the contract. The Government defended primarily on the ground that contract was unenforceable due to the illegal conflict of interest on the part of Mr. Wenzell. Prior to the negotiation of the contract, Mr. Wenzell, at the invitation of Director of the Budget, served as a part-time consultant to the Government, performing a financial analysis of the Tennessee Valley Authority (TVA) for the purpose of estimating the amount and source of a subsidy to be

given by the Government to the TVA. Wenzell, then as a result of his knowledge and expertise concerning the TVA, was requested by the Government to participate in the negotiations, primarily as a consultant in the technical area of interest cost and any financing that would be required in connection with the contract. During this period, one of the partners on the project, the president of Middle South Utilities, asked Wenzell to ascertain the opinion of First Boston as to what the interest rates would be for financing the project. Wenzell acquired this information from his colleagues at First Boston and gave the information to the president of Middle South Utilities. Ultimately First Boston was selected as the financing agent for the project.

The Court held that the activities of Mr. Wenzell fell within the scope of 18 U.S.C. § 434, and that the contract was unenforceable, even though the party seeking enforcement appeared entirely innocent.[5] First, the Court held that Mr. Wenzell, notwithstanding the fact that he took no oath, had no tenure, and served without salary except a $10 per diem in lieu of subsistence, and served only in a consultative function, was an agent of the United States in connection with this contract. Second, it held that his activities fell within the scope of the statute. As an officer and director of First Boston, he had an indirect interest in the contract which the sponsors of the project were attempting to obtain. First Boston had arranged the financing on the project and had acquired a reputation in the area of private power financing. Wenzell had also acquired certain expertise in this area as a result of his work for the Bureau of the Budget in preparing the TVA analysis. Moreover, as set forth in the statement of facts, the contractor was not innocent of the fraud since it recognized Wenzell's conflict of interest almost from the outset of the negotiations, and took no action to diffuse the conflict.

According to the Court, the primary purpose of the statute is to protect the public from the corrupting influences that might be brought to bear upon Government agents who are financially interested in the business transactions which are being conducted on behalf of the Government. 363 U.S. at 563 This protection can be fully accorded only if contracts which are tainted by a conflict of interest on the part of the Government may be disaffirmed by the Government. If the sole remedy were merely a criminal prosecution against its agents, then the public will be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent.[6]

In *William C. Godley v. United States*, 5 F.3d 1473 (Fed. Cir. 1993), the Court held that there was a material issue of fact as to whether the Postal Service agent's illegal conduct tainted the contract and, therefore, whether the contract was void *ab initio*, or voidable, thereby precluding summary judgment for the contractor. There, the Postal Service's agent was convicted of several counts of conspiracy and bribery involving a subcontractor, of which Godley allegedly lacked knowledge. After the contractor had completed construction of the postal facility, of which the Government had taken

possession, the Postal Service stopped paying the lease amount and informed Godley that the contract was not valid because it was tainted by the illegal conduct of the Postal Service's agent responsible for this project. The court cited *J.E.T.S., Inc. v. United States*, 838 F.2d 1196, 1200 (Fed. Cir. 1988), *cert. denied*, 486 U.S. 1057 (1988),[7] and *United States v. Mississippi Valley Generating Co.*, *supra*, for the propositions that, in general, a Government contract tainted by fraud or wrong-doing is void *ab initio*, and that the inherent difficulty in detecting corruption requires that contracts made in violation of the conflict of interest statute be held unenforceable, even though the party seeking enforcement ostensibly appears entirely innocent. The Court distinguished the instant case from the facts in *United States v. Mississippi Valley Generating Co.*, *supra*, where the contractor was not completely innocent. Moreover, the Court held that "[i]legal acts by a Government contracting agent do not alone taint a contract and invoke the void *ab initio* rule. Accordingly, "the record must show some causal link between the illegality and the contract provisions," and must show, as a factual matter, that the legal conduct of the Postal Service's agent caused any unfavorable terms. Therefore, although the Court of Federal Claims held that the contract was voidable, since the Government accepted the building and entry of the contract with the knowledge that its agent's conduct made the contract voidable, these factors do not show that the contract was voidable rather than void *ab initio*. In the event that the trial court determined that the contract was voidable, it must also determine whether the Government canceled the contract within a reasonable time after discovery of the illegality.

As set forth in our findings, Mr. Stuttmann was actively involved in assisting Messrs. von Dungen and Keller in formulating the Government's requirement for a coal crusher. Over a period of time, he prepared a number of specification drafts as he and Messrs. von Dungen and Keller discussed performance requirements and prices, leading ultimately to the establishment of the performance requirements to be incorporated in the specification. He prepared the specification which became the specification used by the Government in its solicitation. He prepared the price estimate that became the Government's estimate which was improperly issued with the IFB. He had not acquired a certain expertise in the area of his work as a result of his work for the Rheinau Coal Yard and his participation in the formulation of the Government specifications. Rather, his assistance to Messrs. von Dungen and Keller arose out of his existing knowledge in the construction of coal crushing plants. Unlike Mr. Wenzell in *United States v. Mississippi Valley Generating Co.*, *supra*, he did not participate in any negotiations leading to the contract award. Instead, his firm participated in the formally advertised procurement as a competitor to appellant. He never represented himself, nor was he represented by the Government, as an agent of the U.S. Government. Nevertheless, the activities in which Mr. Stuttmann engaged, both before the award of the contract, and following the award during the administration and termination of the contract, were activities that fell within the class of activities prohibited by 18 U.S.C. § 208. Although 10 U.S.C. § 208 differs from its predecessor, 18 U.S.C. § 434, Mr. Stuttmann was not an agent of the U.S.

Government, as defined by *United States v. Mississippi Valley Generating Co.*, *supra*, with respect to 18 U.S.C. § 434, nor was he an employee of the U.S. Government as applied in 18 U.S.C. § 208.

The participation of Mr. Stuttmann and Fa. HAZEMAG in consultations with Messrs. von Dungen and Keller, and in the drafting of the specifications, and the Government's issuance of the IFB contained those specifications without disqualifying Fa. Noell, and Fa. HAZEMAG, were violations of FAR 9.505-2. Except with respect to the specifications, we have not found any causal linkage between the illegal participation of Mr. Stuttmann in the formulation of the specifications and submission of the Fa. Noell bid on the one hand, and the contract provisions on the other as required by *William C. Godley v. United States*, *supra*. Therefore, although the contract was voidable, we hold that there is no basis for holding that the contract was void *ab initio* as a result of the conflict of interest of Mr. Stuttmann. Moreover, the Government never cancelled the contract after its discovery of the irregularity.

Whereas, *American Telephone and Telegraph Company v. United States*, addressed the question of the validity of a contract awarded in violation of a statute or regulation, *John Reiner & Company v. United States*, 163 Ct. Cl. 381, 325 F.2d 438 (1963), *cert. denied*, 377 U.S. 931 (1964), addressed the question as to whether the award to a bidder whose bid was nonresponsive was illegal and void so that the contractor cannot found a cause of action on it. There, the Comptroller General, ruling on a protest against the contract award, held that the invitation did not adequately inform bidders as to how they should bid with respect to the delivery dates, and that the contract should be canceled. The contracting officer canceled the contract in compliance with the ruling of the Comptroller General. Recognizing that the rules for fraud, conflict of interest or some like defect might be different, the Court held:

> In testing the enforceability of an award made by the Government, where a problem of the validity of the invitation or the responsiveness of the accepted bid arises after the award, the court should ordinarily impose the binding stamp of nullity only when the illegality is plain. If the contracting officer has viewed the award as lawful, and it is reasonable to take that position under the legislation and regulations, the court should normally follow suit. Any other course could place the contractor in an unfortunate dilemma. If he questions the award and refuses to accept it because of his own doubts as to the possible legality, the contractor officer could forfeit his bid bond for refusing to enter into the contract. The full risk of an adverse decision on validity would then rest on the bidder. If he accedes to the contracting

> officer and commences performance of the contract, a subsequent holding of non-enforceability would lead to denial of all recovery under the agreement even though the issue of legality is very close; and under the doctrine of *quantum meruit* there would be no reimbursement for expenses incurred in good faith but only for any tangible benefits actually received by the defendant. . . . It is therefore just to the contractor, as well as to the Government, to give him the benefit of reasonable doubts and to uphold the award unless its invalidity is clear.

Id. at 386-87, 440. The court, therefore, held that the award must be deemed lawful, not void.

A contract which is "plainly illegal" and is a nullity and void *ab initio* is one which is made contrary to a statute or regulation, either because of some action or statement by the contractor, or when the contractor is on "direct notice that the procedures being followed were violative of such requirements." *Total Medical Management, Inc. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir. 1997), *cert denied*, 522 US 857 (1997); *United States v. Amdahl Corporation*, 786 F.2d 387, 395 (Fed. Cir. 1986). Both the statute (10 U.S.C. § 2305(b)(3)), and the regulation (FAR 14.407-1(a)) provide that the award shall be made "to the responsible bidder whose bid conforms [conforming] to the solicitation and is [invitation, will be] the most advantageous to the United States [Government], considering only price and the other price-related factors included in the solicitation [invitation]."[8] This applies unless the IFB authorized the submission of alternative bids, and the supplies offered as alternatives meet the required specifications. *Prestex Inc. v. United States*, 162 Ct. Cl. 620, 626, 628, 320 F.2d 367, 372-73 (1963).

> Rejection of irresponsive bids is necessary if the purposes of formal advertising are to be attained, that is, to give everyone an equal right to compete for Government business, to secure fair prices, and to prevent fraud. Indeed, where the specifications in the invitation to bid are at variance with the contract awarded to the successful bidder, the resulting contract may be "so irresponsive to and destructive of the advertised proposals as to nullify them." Such a contract would be one issued without competitive bidding and therefore invalid.
>
> . . . .

> Having nevertheless gone to the expense of manufacturing all the material required by the attempted contract and in reliance on it, plaintiff contends that in justice it is entitled to be reimbursed in an amount sufficient to restore it to a position of status quo. . . .
>
> Even though a contract be unenforceable against the Government, because not properly advertised, not authorized, or for some other reason, it is only fair and just that the Government pay for goods delivered or services rendered and accepted under it. In certain limited fact situations, therefore, the courts will grant relief of a quasi-contractual nature when the Government elects to rescind an invalid contract. No one would deny that ordinary principles of equity and justice preclude the United States from retaining the services, materials, and benefits and at the same time refusing to pay for them on the ground that the contracting officer's promise was unauthorized, or unenforceable for some other reason. However, the basic fact of legal significance charging the Government with liability in these situations is its retention of benefits in the form of goods or services.

Id. In *Prestex Inc. v. United States*, the bid was nonresponsive, although not discovered to be so until after award. The production sample submitted by Prestex failed to conform to the contract specification and was rejected. We dismissed an appeal from this rejection for lack of jurisdiction. The Comptroller General decided that since the bid was nonresponsive, there was no valid contract and that since the Government had not accepted the nonconforming material, nor retained any tangible benefits, no recover was available on a *quantum meruit* basis. The Court of Claims held that the contract was invalid, that the Government had not accepted or used the material, and was not otherwise unjustly enriched, and that, therefore, the Government was not liable for Prestex's expense incurred in the manufacture of the material.

Unlike the asserted invalidity of the contract based on the conflict of interest violations, where the award is based on a nonresponsive bid, it is invalid and cannot be enforced against the Government. FAR 14.301; *Prestex Inc. v. United States*, *supra*. Pursuant to FAR 14.404-2, "[a]ny bid that fails to conform to the essential requirement of the invitation shall be rejected." In determining what are the essential requirements of the invitation and bid, decisions of the Comptroller General refer to the material provisions of the invitation. *Firth Construction Company, Inc. v. United States*, 36 Fed. Cl. 268, 272 (1996); *see Seaboard Electronics Co.*, B-237352, 90-1 CPD ¶ 115; *Control Line, Inc.*, B-235747, 89-2 CPD ¶ 313. According to *Prestex Inc. v. United States, supra*, at 627,

372, permissible waivers are those which do not go "to the substance of the bid or work an injustice to other bidders. A substantial deviation is defined as one which affects either the price, quantity, or quality of the article." Therefore, there are two elements to the inquiry: a clear intent to be bound, and sufficient terms so that the acceptance of the offer forms a contract on the basis of the IFB. *Firth Construction Company, Inc. v. United States* at 273; *Johnny F. Smith Truck and Dragline Services, Inc.*, B-252136, 93-1 CPD ¶ 427; *JRW Enterprises, Inc.*, B-250480, 93-1 CPD ¶ 111; *Control Line, Inc.*, *supra*.

If appellant's bid was nonresponsive, the contract was invalid and could not be enforced against the Government. The only remedy, if any, would be *quantum meruit* or *quantum valebant* based on implied-in-fact contract, or more properly on implied-in-law. *Mega Construction Company, Inc. v. United States*, 29 Fed. Cl. 396, 469-472 (1993); *cf. United States v. Amdahl Corporation*, *supra*. In such a case, the goods must have been delivered to the Government, or services performed, and accepted by the Government, with the Government receiving tangible benefit therefrom. Here, inasmuch as the Government prevented delivery of the proffered coal crushing machine and screening plant, and refused to permit any testing thereof, and did not receive any tangible benefits, there is no basis to further consider whether appellant would be entitled to *quantum valebant* or *quantum meruit* under any theory of implied-in-fact or implied-in-law contract. Moreover, we have no jurisdiction to grant relief under an implied-in-law theory.

It is clear here that the specifications Dr. Walter prepared and submitted to appellant differed in a number of material respects from those contained in the IFB. At bid opening, the bids were recorded. "Responsiveness is determined by reference to the bids when they are opened and not by reference to subsequent changes in a bid." *Toyo Menka Kaisha, Ltd. v. United States*, 220 Ct. Cl. 210, 220, 597 F.2d 1371, 1377 (1979). The Fa. Noell bid was rejected as nonresponsive because Fa. Noell had not signed the Certificate of Procurement Integrity. Unlike the facts in *Toyo Menka Kaisha, Ltd. v. United States*, nothing unusual was noted at this time, either with respect to the alternative proposal by Fa. Noell or the possible alternative proposal of appellant. Whether or not appellant's bid price contained an amount for value added tax, the bid as submitted in this regard conformed to the IFB, and the Government never questioned the bid price or the possible inclusion of the value added tax. Whether appellant was mistaken as to whether it included its alternative specification in its bid package when appellant deposited it in the bid box the day before bid opening, or the Government's lack of attention to the bids submitted at the time of bid opening, or through mishandling of the bids after bid opening and prior to evaluation, contributed to the confusion as to the substance of the contract, we are unable to find that appellant's bid contained the alternative specifications. We have found by the preponderance of evidence, however, that at the time of evaluation of the bids on Monday, following the Friday bid opening, and at the time of the award of the

contract, the contract, as awarded, did not contain the alternative specification prepared by Dr. Walter. Moreover, both parties treated the contract as valid and litigated the appeal on the basis that it was a valid contract. Indeed, in its brief, the Government argues that appellant did not submit alternative specifications with its bid. Nevertheless since the Government also contended that the contract was void *ab initio*, because of the asserted nonresponsiveness of appellant's bid, we hold that these assertions violate the law of non-contradiction and that the Government failed to carry its burden of proof that appellant's bid was nonresponsive.

The Government supports its termination of the contract primarily on the theory that appellant failed to meet the dimensional requirements specified in the specifications for the components of the coal crushing machine and on its speculative assertion that appellant failed to meet the performance requirements set forth in the specifications. Appellant asserts that it was not in default because the specifications were defective and because it offered a coal crushing machine which met the performance requirements of the specification.

Although appellant draws a distinction between performance specifications and design specifications, appellant's claim is based on the well-established principle set forth in *United States v. Spearin*, 248 U.S. 132 (1918), and its numerous progeny, that there is an implied warranty of the specification, which allocates the risk to the Government when the specifications it furnishes are not suitable for the intended purpose. Thus, where the Government prepares the specifications prescribing the character and dimensions, it implicitly warrants, nothing else appearing, that if the specifications are complied with, satisfactory performance will result. *J.D. Hedin Construction Co., Inc. v. United States*, 171 Ct. Cl. 70, 76, 347 F.2d 235, 241 (1965), citing *United States v. Spearin*. As we said in *Radionics Inc.*, ASBCA No. 22727, 81-1 BCA ¶ 15,011 at 24,276, "[t]he fact that the product, built to the Government design, had to meet test specification performance requirements does not extinguish the warranty or shift the risk of design inadequacies to the contractor." That Fa. HAZEMAG prepared the specifications does not negate this implied warranty because the Government adopted the specifications as its own, and for reasons unclear from the record, did not include the Fa. HAZEMAG drawing in the IFB. As a result, the specifications issued as part of the IFB, without the Fa. HAZEMAG drawing, did not specify how the components of the machine should be arranged. As such, the specifications were incomplete in this regard. Further, as stated in *J.D. Hedin Construction Co. Inc. v. United States*, at 76, 241:

> [A]n experienced contractor cannot rely on government-prepared specifications where, on the basis of the government furnished data, he knows or should have known that the prepared specifications could not produce the desired result for "* * * he has no right to make a useless thing and charge

> the customer for it." *R.M. Hollingshead Corp. v. United States*, 124 Ct. Cl. 681, 683, 111 F.Supp 285, 286 (1953).

Accordingly, where the design specifications are defective, and the Government has breached its warranty of suitability, even though there may be a number of causes contributing to nonperformance that can be traced to appellant's fault, the termination for default is improper and must be converted to a termination for the convenience of the Government. *D.E.W. Incorporated*, ASBCA No. 35896, 94-3 BCA ¶ 27,182.

Contrary to appellant's contentions, the specifications were not performance specifications with design guidelines. Rather, they contained a mixture of performance and design specifications. However, as we found above, the specifications were defective in the following respects: First, the dimensions of the components were based on Fa. HAZEMAG product line items and Fa. Haverand Boecker screening plant. Second, the Fa. HAZEMAG initially proposed specification containing the dimensions for the conveyor belt and screen exceeded what was required for the capacity requirement specified in the performance portion of the specification. Third, the specifications did not include the drawings prepared by Fa. HAZEMAG required for the depiction of the required arrangement and assembly of the components. Fourth, although the English language version of the specification controlled, there were omissions in the German "courtesy translation" of the specifications that were contained in the English language version that defined inspection and acceptance requirements, the performance standards, and the testing to ensure satisfactory functional and operating efficiency of the plant. Fifth, there was a conflict between the design and performance requirements of the specifications. Thus, a machine manufactured and assembled in strict compliance with the specifications contained in the IFB would not, according to standard industry mathematical formulae, have met the performance requirements specified in those specifications.

Since the Government rejected testing of appellant's tendered coal crushing machine and screening plant, the Government has not proved that appellant's coal crushing machine would not have satisfied the performance requirements of the specification. Both appellant's and the Government's experts, Dr. Walter and Mr. Stuttmann, confirmed the appropriateness of the standard industry mathematical formulae for determining the dimensions of the component elements of the coal crushing plant based on the performance requirements. Moreover, Mr. Stuttmann confirmed that Dr. Walter's computations were correct, thereby confirming Dr. Walter's contentions that appellant's proposed coal crushing and screening plant would meet the functional and performance requirements of the specifications. Indeed, as we found above, the dimensions of a conveyor belt and screen as proposed by appellant were identical to the revised dimensions for these components presented by Mr. Stuttmann prior to bid opening and contained in the Fa. Noell/Fa. HAZEMAG alternative specifications in its bid.

The law is well-settled that the Government has the right to obtain precisely what is specified in the contract. *Ace Precision Industries, Inc.*, ASBCA No. 40307, 93-2 BCA ¶ 25,629 at 127,552; *Astro-Dynamics, Inc.*, ASBCA No. 28381, 88-3 BCA ¶ 20,832 at 105,361. This includes strict compliance with the dimensional requirements and the characteristics of component parts and assemblies. Moreover, it is also well-settled that a contractor must comply with the technical specifications regardless of their technical soundness, and is not entitled to substitute its own views for those of the Government. Therefore, when appellant attempted delivery of a coal crushing machine and screening plant that did not strictly comply with the specified dimensional requirements for various components, it may have been in technical default of the contract absent our holdings that the specifications were defective and that the Government breached its warranty of suitability.

However, it is also well-settled that a reasonable and proper exercise of discretion must not be tainted by impermissible motive. *Darwin Construction Company, Inc. v. United States*, *supra*; *Schlesinger v. United States*, *supra*; *Walsky Construction Company*, *supra*. As the Court held in *Fairfield Scientific Corporation v. United States*, 611 F.2d 854, 862 (Ct. Cl. 1979):

> The default clause does not say that the Government "shall" or "must" terminate the contract in the event of default, only that it "may" terminate it. Not only is the contracting officer to consider whether or not the default is excusable, but the regulations require him to consider at least seven factors in addition to the default in deciding whether or not to terminate a contract. "The existence of discretion is undeniable." *Schlesinger v. United States*, 390 F.2d 702, 707, 182 Ct. Cl. 581 (1968). If the contracting officer was improperly influenced *by plaintiff's competitor or by anyone* else to terminate the contract for default rather than to exercise his own independent judgment in the light of the factors set out in the regulations, it would represent an abdication rather than an exercise of his discretion. [Citations omitted] [Emphasis added]

See also Quality Environment Systems, Inc. v. United States, 7 Cl. Ct. 428, 435 (1985) (on Wunderlich Act review from *QES, Inc.*, ASBCA No. 22178, 78-2 BCA ¶ 13,512, remanding the matter to the Board for further proceedings to determine if the decision terminating the contract for default constituted in any way an abuse of discretion requiring the granting of convenience termination relief to the contractor).

There was no evidence that the contracting officer adequately considered the factors listed in FAR 49.402-3(f). As detailed in our findings and holdings, this procurement was flawed from the very beginning. The evidence clearly established that the specifications in this contract were for a proprietary coal crushing and screening plant manufactured by Fa. HAZEMAG. Mr. von Dungen's testimony concerning his and Mr. Keller's role in formulating the ultimate requirements and specifications simply is not credible, and his lack of candor in this regard with the contracting office lead the contracting officer to rely on his advice throughout the period from the rejection of the proffered machine up to her termination decision. Messrs. von Dungen and Keller requested funding in July 1993, and submitted two separate purchase requests recommending that the contract be awarded to Fa. Vörös, and Fa. Noell, both affiliates of Fa. HAZEMAG, and the sales representatives for Fa. HAZEMAG. Their removal of the HAZEMAG logo and addresses from the specifications prepared by Mr. Stuttmann and in submitting these specifications as the "courtesy translation" disguised the true originator of the specifications and constituted a deception with the contracting office and bidders. However, it was their continued consultation with Mr. Stuttmann following their receipt of appellant's specifications, and during the entire period in which they were recommending to the contracting officer that the contract be terminated for default, that is particularly egregious in tainting the decision process leading to the termination of the contract for default. The force of their advice was exacerbated by their failure to clearly disclose to the contracting officer before she terminated the contract for default that, based on revised projections, there was no further need for the coal crusher. Contrary to the SPECIAL PROVISIONS included in the specifications, and specifically, paragraphs 2.18, 3.1, and 3.7, she did not permit the inspection and testing to determine if appellant's proffered machine satisfied the performance requirements of the contract. We believe that appellant has established, by the preponderance of evidence, as set forth in our findings, that this termination for default was an abuse of discretion.

Accordingly, we sustain the appeal and convert the termination for default to a termination for the convenience of the Government.

Dated: 29 August 2000

ROLLIN A. VAN BROEKHOVEN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur in result (see separate opinion)

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur in result (see separate opinion)

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

[1] The record reflects that brochures collected in R4, tab 96, were presented as intending to convey the impression that these had been collected prior to the preparation of the solicitation and were used by the Rheinau Coal Yard officials to define the Government's requirements, including the dimensions, weights, sizes, output capacity, and available standard items on the market (tr. 1/24-29; *see also*, Gov't br., page 5, proposed findings 3 and 4). However, as the testimony on this point clearly establishes, the documents contained in R4, tab 96, were not in fact received prior to the preparation of the solicitation (tr. 1/112-13).

[2] All references to FAR herein, refer to FAR as of 1 January 1994.

[3] The evidence as to whether appellant's bid submitted on 3 February 1994 contained appellant's alternative specifications and the BWM brochure is in conflict. The Government presented a photocopy of a cut-out portion of an envelope with a handwritten ABS address and handwritten RCO address (ex. G-6). There was no clear testimony to the effect that this envelope was the envelope in which appellant deposited its bid in the bid box. On the other hand, appellant's sales manager testified that he had put the signed bid documents, together with the alternative specifications and BWM brochure in a company envelope, sealed the envelope and hand delivered it to RCO Seckenheim, placing it in the bid box (tr. 4.12-19). He further testified that the photocopy portion of the envelope presented by the Government, was not the envelope in which he deposited appellant's bid in the Government's bid box, and that appellant always used white business envelopes of a specified size with appellant's logo and address printed on the envelope (ex. A-6; tr. 4/71-76). Moreover, he did not recognize the handwriting on the envelope presented as ex. G-6 as being the handwriting of anyone at ABS,

and testified that it would be abnormal to use a blank, unmarked envelope with handwritten return address and address for delivery.

[4] *Rev'd on recons.*, 86-2 BCA ¶ 18,959, *rev'd, Darwin Construction Company, Inc. v. United States*, 811 F.2d 593 (Fed. Cir. 1987), with instructions to the Board to convert the termination for default into a termination for convenience of the Government in accordance with the Board's initial decision.

[5] The statute, 18 U.S.C. § 434, read:

> Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both.

[6] The relevant statute in *United States v. Mississippi Valley Generating Co., supra*, 18 U.S.C § 434 was repealed in 1962, and replaced by 18 U.S.C. § 208 in 1962. Section 208 provides in pertinent part:

> (a) Except as permitted by subsection (b) hereof, whoever being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for ruling or other determination, contract, claim, controversy, charge, . . . or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest ---

Shall be fined not more than $10,000, or imprisoned not more than two years, or both.

[7] *J.E.T.S., Inc. v. United States* involved an appeal from a decision of the ASBCA, in which we held that bad faith of the contractor in securing award made the contract voidable. The parent company of the contractor and its principals had been convicted of various charges of conspiracy to defraud the Government in connection with obtaining four other Government contracts. The Court, affirming the Board's decision, held that it could not say that the Board erred in concluding that J.E.T.S. had committed fraud in obtaining the contract.

[8] The quoted portion of the statute and the regulation is essentially identical, except as indicated by the bracketed words, which reflect the quoted language from the regulation that differed from the language of the statute.

CONCURRING OPINION BY
JUDGES THOMAS AND STEMPLER

We concur in result without joining in all of the discussion in the foregoing opinion. The termination for default should be converted to a termination for convenience.

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 48207, Appeal of ABS Baumaschinenvertrieb GmbH, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals