



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Werres Corporation

File: B-223394

Date: October 14, 1986

DIGEST

1. Protester's original request that contracting agency make a change in its advertised specifications did not constitute a protest and was merely an informational inquiry. Consequently, protest filed with the General Accounting Office within 10 working days of the agency's denial of the protester's subsequent protest to the agency is timely.
2. Where agency has established prima facie support for its requirement that forklifts be powered by 36-volt batteries, the protester has the burden of showing the agency's position to be clearly unreasonable. Protester has not demonstrated that agency's determination that 36-volt batteries will provide more reliable and efficient forklifts is clearly unreasonable.
3. Protest against agency's failure to purchase battery chargers along with the forklift trucks to be purchased is untimely since the fact that battery chargers would not be purchased was apparent prior to bid opening and allegation was not raised by protester until its comments to the agency report.

DECISION

Werres Corporation (Werres) protests any award under National Aeronautics and Space Administration (NASA) invitation for bids (IFB) No. 9-BG33-36-6-47B for three forklift trucks, Clark model EC500 20 or equal. The IFB listed several salient characteristics, including a requirement that any forklift offered as an equal product be powered by a 36-volt battery. Werres contends that this requirement unduly restricts competition and argues that specific performance levels should have been used by NASA to express the agency's requirement rather than battery voltage.

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The invitation was issued on May 14, 1986. By letter dated May 14, Werres requested NASA to amend the IFB to permit bidders to offer forklift trucks powered by either 36-volt or 24-volt batteries. After reviewing the request, NASA decided that the requirement would not be changed, and on May 23 NASA advised Werres of the reasons for this decision. The agency mailed a letter to Werres on May 27 confirming the contents of the conversation. By letter of May 27, Werres protested NASA's decision and on June 13, the agency informed Werres that the specifications would not be changed. Bid opening occurred on June 16 and Werres' protest was filed with our Office on June 17.

The agency contends that the Werres protest is untimely since it was filed more than 10 working days after the original May 14 protest to the agency had been denied. See 4 C.F.R. § 21.2(a)(3) (1986). In our view, however, Werres' May 14 letter was merely an inquiry as to whether the agency would consider amending the specifications and did not constitute a protest. Finalco, Inc., B-220651, Jan. 2, 1986, 86-1 CPD ¶ 4. Only after the agency had advised Werres on May 23 that it would not amend the specifications and the reasons therefor, did Werres have any basis for protesting. This it did by letter of May 27 to the agency and since Werres' subsequent protest to our Office was filed within 10 working days after the agency's June 13 denial, it is timely and will be considered on the merits.

NASA states that a 24-volt battery-powered forklift truck will not meet the agency's minimum needs. The agency argues that a 24-volt battery is not suitable for the rider-type forklift trucks being procured since it is not as durable as a 36-volt battery under constant operation, does not provide as fast travel and lifting speeds, and does not provide a charge that is as great and as long lasting. While NASA acknowledges that it may be possible to generate the same horsepower on a 24 or 36 volt system, NASA indicates that a 36 volt system results in greater productivity based on its faster speed and longer charge. Further, if additional attachments are subsequently purchased for use of the forklifts, as is currently contemplated, these could not be handled by a 24-volt battery.

In addition, NASA indicates that the purchase of 24-volt battery-powered forklift truck generates compatibility problems since all the agency's current vehicles use 36-volt batteries. NASA states that it would need to buy additional 24-volt battery chargers which would simply increase the cost that the agency would have to pay to satisfy its needs. Also, the addition of 24-volt battery chargers to the 36-volt

battery chargers already being used is a safety hazard since it could lead to the wrong voltage battery being charged on the wrong battery charger. The use of battery chargers having different voltage capacities than the batteries being recharged constitutes an unacceptable safety risk because the charging of a low voltage battery on a higher voltage battery charger can result in an explosion of the battery. For these reasons, NASA contends that the 36-volt requirement is proper.

Werres argues that the specifications should not require any specific minimum voltage but rather, should simply identify the actual performance characteristics that the forklift truck would be required to meet. Werres contends that once a truck met these performance requirements it is irrelevant whether or not it had a 24-volt or a 36-volt battery. Werres also contends that NASA should be purchasing matching battery chargers for the new forklift trucks since there is no assurance that the ampere-hour rating of the battery chargers owned by NASA will match the ratings of the new batteries. Werres argues that charging a battery with a charger with different ampere-hour ratings could result in similar operating hazards during recharging and that the agency's arguments regarding safety are not persuasive.

A protester contending that a solicitation requirement is unduly restrictive has a heavy burden of proof. The contracting agency has broad discretion in determining its minimum needs and the best method of accommodating those needs. Where, as here, a protester challenges a specification as unduly restrictive of competition, the initial burden is on the procuring agency to establish prima facie support for its contention that the restrictions it imposes are necessary to meet the minimum need. Once the agency has established prima facie support, the burden is then on the protester to show that the requirement complained of is clearly unreasonable. Marquette Electronics, Inc., B-221334, Mar. 13, 1986, 86-1 CPD ¶ 253.

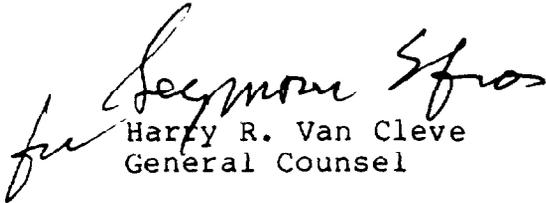
In our opinion, the contracting agency has established prima facie support for the battery voltage requirement. The agency has shown that a 24-volt battery-powered forklift truck would not meet the agency's needs as reliably or efficiently as the 36-volt battery. Further, a forklift with a 24-volt battery would not be able to handle additional attachments for the trucks and would require the agency to also purchase 24-volt battery chargers. In addition, compatibility with current equipment and safety considerations were part of the agency's determination to impose a specific voltage requirement rather than incorporate performance characteristics as suggested by Werres. In light of this, the burden of proof shifts to the

protester to show that this requirement is clearly unreasonable.

Werres has not met this burden. Basically, Werres has simply argued that its forklift truck powered by a 24-volt battery could meet and, in some cases, exceed the agency's needs--other than the voltage requirement. Werres has not disputed NASA's assertions that the 36-volt battery would result in the agency obtaining more reliable and efficient forklifts. While Werres believes that the agency's needs could be adequately met by imposing performance requirements, Werres has not shown that NASA's decision to use a specific voltage requirement is unreasonable.

Finally, we note that to the extent Werres is alleging that the trucks should not be purchased without "matching" battery chargers, this allegation is untimely and will not be considered. It was apparent prior to bid opening that the purchase was being made without battery chargers Werres was on notice of this basis prior to bid opening. Under our Bid Protest Regulations Werres should have raised this issue before bid opening in order for it to have been considered, and since the contention was not raised by Werres until its reply to the agency report on the protest it is untimely. 4 C.F.R. § 21.2(a)(1) (1986).

Accordingly, the protest is denied.

for 
Harry R. Van Cleve
General Counsel