



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Wallace Benders Corp.--Reconsideration

File: B-223624.4

Date: December 1, 1986

DIGEST

Agency should have amended solicitation specifications to allow for the offer of alternative equipment that the agency had determined would meet its minimum needs. Protest that the specifications were unduly restrictive is denied, however, where the protester clearly understood from the agency's best and final offer request that its alternative equipment would be acceptable if the agency's size limitations could be met, and the protester responded with a corrected best and final offer that the agency reasonably believed was for the alternative equipment, but rejected because it was not low. Although the protester asserts that its offered price was actually for the equipment originally specified, its assumption that the agency would understand this, and request another round of best and final offers to give it an opportunity to submit a price for the alternative equipment, was unreasonable.

DECISION

Wallace Benders Corp. requests reconsideration of our decision to dismiss as untimely its protest against the Department of the Navy's contract award under request for proposals (RFP) No. N00600-85-R-2496 for a rotary pipe bending machine. We have determined that the protest should both be considered timely. We deny the protest on the merits.

BACKGROUND

Wallace's original protest, which we received on July 14, 1986, alleged that the Navy had arbitrarily rejected Wallace's alternative proposal under the RFP. Enclosed with the protest was a letter of July 8, 1986, from Wallace to the Navy contracting officer, which complained of the agency's rejection of Wallace's alternative proposal. The July 8 letter referred to a letter of May 12, 1986, from the Navy to Wallace, in which the Navy had "rule[d] out the improved

037582

design." We concluded that Wallace's basis of protest arose when it received the May 12 letter and issued a notice dismissing the protest as untimely because it was not filed until nearly 2 months later, after the contract had been awarded to another firm on July 1, 1986. We affirmed our dismissal by decision of July 28, 1986. Wallace Benders Corp.--Reconsideration, B-223624.2, July 28, 1986, 86-2 CPD ¶ 124.

Wallace filed this second request for reconsideration on August 7, 1986. Wallace stated that by letter dated July 28, 1986, the agency informed Wallace that the technical questions concerning Wallace's alternative design had been resolved. Wallace questioned how we could conclude that the Navy letter of May 12 was notice that its alternative design was unacceptable when the Navy had just found it to be acceptable. We telephoned the Navy for clarification and learned that the May 12 letter in fact was not intended to be a final rejection notice. We therefore requested that the agency submit a written report on the protest. See 4 C.F.R. § 21.3 (1986).

The agency's report reveals a series of events marked by confusion and misunderstanding. The actual facts and circumstances, as we understand them, are as follows.

The RFP was issued on June 7, 1985 and specified that the solicited rotary pipe bending machine be a "swing arm" type machine. Wallace, however, offered both a swing arm model and a "clamp die" model. (According to Wallace, it did this at the contracting officer's suggestion.) After a technical evaluation had been performed, the contracting officer sent Wallace a letter dated December 24, 1985, stating that the firm's proposal had been found technically unacceptable but capable of being made acceptable if clarifications and revisions were made in the areas indicated in an enclosure. The letter also gave Wallace the opportunity to submit a revised proposal. With respect to the offer for the clamp die model, the enclosure stated that the specifications required a swing arm machine and that the clamp die machine had been reviewed and determined to be unacceptable. With respect to the swing arm model, the enclosure stated that a technical evaluation could not be performed because Wallace had not submitted the required "brochures, photographs, illustrations, drawings, or narrative" showing that the offered equipment could meet the government's specifications.

Wallace did not submit a revised offer. Prior to the due date for revised proposals, however, Wallace did send a letter reiterating why it believed the clamp die model should be considered acceptable. For example, Wallace pointed out that the applicable military specification allows for both clamp die and swing arm type machines. The letter was reviewed by the technical evaluators in lieu of a revised proposal. The contracting officer then sent the letter of May 12, 1986 to Wallace. This letter again stated that Wallace's proposal had been found technically unacceptable but capable of being made acceptable if clarified and revised in the areas indicated in an enclosure. It also requested that Wallace submit a best and final offer.

The enclosure to the May 12 letter stated:

"Wallace Benders Corp. is unacceptable as submitted. The offeror has not provided sufficient technical information to permit a complete technical evaluation.

This Office acknowledges and appreciates Wallace Benders Corp.'s clarification * * * pertaining to an "integral clamp on bend die" type machine. There is no dispute that this type machine can accomplish pipe bending operations described in the subject solicitation. However, [due to] floor space limitations, the requirement for a "swing arm" type machine shall remain as written in accordance with MIL-B-80083B, paragraph 3.4.4.2."

The agency states that its intent was to notify Wallace that the clamp die model was acceptable in a functional sense, but nonconforming as to size, and that if this remaining deficiency could be satisfactorily clarified or revised, the machine would be acceptable.^{1/}

Wallace responded to the best and final offer request. In its response, Wallace stated: "We are pleased to learn in your letter dated 12 May 1986 that the contracting officer acknowledges that the integral clamp on bend die type machine can accomplish the pipe bending operations described in the subject solicitation." Wallace went on to say that its original clamp die proposal contained a typographical error which indicated that the clamp die model was significantly larger than it actually is. Wallace stated that since the

^{1/} It also appears that the reference to a lack of technical information was intended to address Wallace's swing arm offer, rather than its clamp die offer.

typographical error appeared to have caused confusion even though other parts of the proposal stated the correct machine dimensions, it was confident that its proposal could be made acceptable by the corrected proposal page enclosed with its best and final offer. Wallace then stated that its best and final offer price was \$324,000.

On July 7, 1986, Wallace received notice that the contract had been awarded to 600 Machinery Inc., at a price of \$317,000.^{2/} Wallace responded to this notice with the letter to the contracting officer of July 8, referenced above, in which it complained of the rejection of its alternative offer of a clamp die machine. The contracting officer sent a reply to Wallace on July 28 (the same day we affirmed our dismissal of Wallace's July 14 protest to our Office). In this letter, the contracting officer stated:

"Contrary to your assertion in your protest that the equipment you offered was determined unacceptable by the Navy, we acknowledged that your equipment was capable of performing according to the Government's specifications in our 12 May 86 letter and advised the only technical problem that remained was a size limitation.

Your Best and Final offer response corrected the size limitation to our satisfaction, however, your Best and Final offer of \$324,000 was not the lowest technically acceptable offer and for that reason your firm did not receive the contract award."

Wallace now asserts that the contracting officer erroneously assumed its best and final offer was for the clamp die type machine. In fact, Wallace states, its offered price was for the swing arm model. In this connection, Wallace notes that the agency's best and final offer request (the May 12 letter) specifically stated that the requirement for a swing arm type machine would remain as written. Wallace states that as a result, it did not believe it was being asked to submit an offer for a clamp die type machine, but to the contrary, believed it had been instructed that only a swing arm type machine would be acceptable. Wallace also notes that while it did continue its argument in favor of the clamp die model in its best and final offer, it expected that the contracting officer would acknowledge the acceptability of the clamp die type machine (based on the corrected dimensions) and then allow Wallace to submit a clamp die offer. In addition,

^{2/} The RFP provided for award to the low, technically acceptable offeror.

Wallace argues that because its offer was for \$324,000, the contracting officer should have recognized that the offer was for a swing arm machine or at least requested clarification from Wallace, since its original swing arm offer was \$328,000 while its clamp die offer was \$301,800.

The Navy asserts that it reasonably assumed that Wallace's best and final offer was for a clamp die type machine since the entire offer consisted of information concerning the actual size of the clamp die model, which was clearly intended to rectify the only deficiency the best and final offer request identified in Wallace's clamp die proposal. The agency also notes that Wallace never supplied the documentation required by the RFP to demonstrate that its swing arm model could meet the specifications (a deficiency which had been pointed out to Wallace in the agency's December 24 request for a revised offer).^{3/} Nor did Wallace in any way indicate that its offer was for a swing arm machine. The agency asserts that it therefore reasonably interpreted the offer as one for a clamp die machine.

The agency also argues that the difference between the original clamp die offer of \$301,800 and the best and final offer of \$324,000 was not enough to raise any question in the contracting officer's mind, particularly in the context of Wallace's best and final offer. Moreover, the agency points out that the offeror has the responsibility to submit an adequately written proposal, and that if it does not do so, it cannot be expected to be considered for award. See Basic Technology, Inc., B-214489, July 13, 1984, 84-2 CPD ¶ 45.

TIMELINESS

As a preliminary matter, the Navy argues that the protest remains untimely and again should be dismissed. The Navy contends that any basis for protest arose no later than the time Wallace received the May 12 letter requesting a best and final offer since Wallace should have known then that once its size nonconformity was corrected, its clamp die proposal would be accepted. Assuming that Wallace should have known this, we are at a loss as to why Wallace would at that point have any basis to protest the rejection of its proposal. If the May 12 letter was not a final rejection of Wallace's clamp die proposal, then it follows that the letter provided

^{3/} Wallace states that it did not supply the information because it believed the offer to be acceptable, but provides no further explanation.

no basis for Wallace to protest the rejection of the proposal. We therefore find no merit to the agency's argument.

ANALYSIS

Although never specifically stated, Wallace's real basis of protest is that the RFP requirement for a swing arm type machine was unduly restrictive of competition. The agency essentially admits that the requirement was unduly restrictive since it now acknowledges that the clamp die type machine met its needs. The proper course of action for an agency to take, when it become apparent that specifications are restrictive, is to amend the specifications to remove the unnecessary restriction on competition. See ITC Distribution & Control Division, B-216462, Mar. 25, 1985, 85-1 CPD ¶ 493. The Navy did not do this here, despite the fact that by its own admission, it had determined that the clamp die model was functionally acceptable before it issued the request for best and final offers.

Nevertheless, we are denying the protest because we think that the agency reasonably interpreted Wallace's best and final offer as one for the clamp die model. As the Navy points out, the only discussion in the offer pertained to the clamp die model. Moreover, not only was there no mention of the swing arm model, but Wallace also never submitted the documentation necessary to demonstrate the acceptability of its swing arm offer. Although Wallace's final price was closer to the price originally offered for the swing arm model than that for the clamp die model, we agree with the agency that this difference alone was not sufficient to put the contracting officer on notice that the offer was, or even might be, for the swing arm model.

In this connection, we note that while the agency's May 12 best and final offer request did state that the specifications would remain as written it was clear that the agency considered the clamp die model unacceptable only because of its failure to meet the size limitation. Wallace's best and final offer clearly reflects that it understood this and realized that it could make its proposal acceptable by correcting the typographical error regarding the clamp die model's actual dimensions. Under these circumstances, we think it was unreasonable for Wallace to assume that the agency would understand, in the context of Wallace's corrected best and final offer, that the price stated was for the swing arm model, and would request another round of best and final offers in order to give Wallace a further

opportunity to submit a price for the clamp die model. We therefore conclude that the agency reasonably believed that Wallace offered the clamp die model, but was not the low offeror.

We recognize, however, that the agency is not totally without fault here because it did not amend the specifications. By not doing so, it did not receive the benefit of competition from other potential offerors who might have been interested in offering the clamp die model, which Wallace describes as less expensive and as the state of the art. Therefore, by letter of today, we are calling this matter to the attention of the Secretary of the Navy and recommending that action be taken to prevent a recurrence of this situation.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel