



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Consolidated Devices, Inc.--Reconsideration
File: B-225602.2
Date: April 24, 1987

DIGEST

Solicitation specifying that calibrator must be capable of applying 0-4000 pounds of force within a specified percentage of uncertainty is deficient, and protest on that ground is sustained where: (1) record shows that uncertainty percentage cannot reasonably apply at or near zero pounds of force; (2) solicitation does not specify some number above zero at which the uncertainty percentage becomes applicable; and -- (3) absence of such a number has a significant cost and technical impact.

DECISION

Consolidated Devices, Inc. (CDI), requests that we reconsider our dismissal of its protest alleging deficiencies in request for proposals (RFP) No. N00123-87-R-0119, issued by the Department of the Navy for calibrators. We reverse the dismissal and we sustain the protest. Award has been made but performance suspended pending our decision.

TIMELINESS

We dismissed CDI's protest as untimely because it raised numerous alleged solicitation deficiencies, but was not filed with our Office or the Navy prior to the December 19, 1986, closing date for receipt of proposals, as required by our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), (3) (1986). CDI did request that the Navy clarify these deficiencies, however, in letters of December 3 and December 11, and CDI now claims that these letters constituted agency-level protests for purposes of satisfying our timeliness requirements. In this regard, where a protest initially is filed with the contracting agency, a subsequent protest to our Office will be deemed timely if filed within 10 working days after adverse agency action on the protest, which in this case would be the receipt of proposals on December 19. 4 C.F.R. § 21.2(a)(3).

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Since CDI's protest was received in our Office on December 31, fewer than 10 working days after the closing date, the protest is timely if CDI's December letters constituted a protest.

On reflection, we agree that CDI's December letters constituted agency protests; that the receipt of proposals on December 19 constituted adverse agency action;^{1/} and that CDI's protest filed in our Office on December 31 was timely.

The Navy maintains that the protest should not be deemed timely based on the December 3 and 11 letters since those letters nowhere indicated an intent to protest formally; the Navy did not treat them as protests under its regulations; and the December 11 letter actually stated CDI's intention to protest in the future, if award were made to another firm.

While these all are factors that we will consider in judging whether a protest has been filed, they concern the form, rather than the substance, of a submission. Although it facilitates matters for a protester to use the word "protest," where, as here, a letter expresses dissatisfaction with a solicitation and requests corrective action, we think such a letter sufficiently manifests an intent to protest. Reeves Brothers Inc.; H. Landau & Co., B-212215.2, B-212215.3, May 2, 1984, 84-1 C.P.D. ¶ 491. CDI's threat in its December 11 letter to protest any award, in our view, merely reflected the seriousness with which CDI was pursuing correction of the alleged solicitation deficiencies. We therefore will review the merits of the protest.

CALIBRATION RANGES

CDI requested clarification of numerous alleged ambiguities and other RFP deficiencies in its December letters, and the Navy has responded to each in its administrative report. CDI's comments on the report, however, are restricted to one alleged deficiency, so we consider CDI to have abandoned its protest as to the others. The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 C.P.D. ¶ 218. The remaining issue concerns whether the RFP adequately defined the torque/force/tension ranges within which the calibrators were to operate.

^{1/} The Navy did advise CDI on December 17 that it would not respond to its letters before the closing date. If this notice were considered to be initial adverse action, the December 31 protest to our Office still would be within 10 working days, and thus timely.

As background, the calibrators are devices to be used for calibrating, or standardizing, the measuring capabilities of torque and force instruments (e.g., torque wrench) as well as other calibrators. This standardization consists of applying a known amount of force, torque or tension (hereinafter, force) to the instrument and then adjusting the indicator on the instrument to show the force being applied. This is done throughout a range of force, expressed in terms of pounds (lbs.) or foot-pounds (lb.-ft.), so that when the instrument is used, the force shown on the instrument's indicator is the force the instrument is applying.

The RFP specified the ranges and degrees of uncertainty (that is, the degree to which the force actually applied is permitted to deviate from the force the calibrator indicates is being applied), of five different types of force the calibrator had to be capable of putting out, as follows:

	RANGE	ALLOWABLE UNCERTAINTY
Bidirectional Torque	0-4,000 lb.-ft.	$\pm 0.5\%$ IV (indicated value)
Unidirectional Torque	0-20,000 lb.-ft.	$\pm 0.5\%$ IV
Force	0-500 lbs.	$\pm 0.125\%$ IV or ± 0.005 lb., (whichever is greater)
Tension	0-2,400 lbs.	$\pm 2.5\%$ IV
Cable Tension	0-5,000 lbs.	$\pm 0.75\%$ IV

The RFP specified that the uncertainty percentages for the tension and cable tension ranges ($\pm 2.5\%$ and $\pm 0.75\%$) would not apply for very low pounds of force but, rather, would apply only from 30-2,400 lbs. and 280-5,000 lbs., respectively. In other words, the uncertainty requirement would not have to be met where the force was below the minimum specified. As shown in the above chart, the RFP also limited the low end of the force range by providing, essentially, that the allowable degree of uncertainty would not be less than ± 0.005 lbs.

CDI argues that the low ends of the first two ranges above (bidirectional and unidirectional torque) are not defined

sufficiently for purposes of applying the + 0.5% IV uncertainty factor because it is not possible to calibrate an instrument with any kind of accuracy at or near a force of zero lb.-ft. CDI further explains that it is necessary to know exactly how close to zero force the uncertainty factor does apply since the number of transducers (the elements of the calibrator which measure output force), needed in the calibrator to assure measurement within the allowable uncertainty, increases at an increasing rate as the force to be measured approaches zero.^{2/} Since these transducers are among the more expensive parts of the calibrator, CDI maintains it cannot prepare a realistic technical or price proposal without knowing the low end limits of the applicability of the uncertainty factors. CDI thus argues that the Navy should specify either some limit below which the uncertainty percentage is not meant to apply, or a minimum error expressed in terms of lb.-ft., as it did for the last three ranges.

The Navy states in response that it is "common practice," "recognized by the industry," to state ranges from zero to a maximum figure. This is so, the Navy maintains, even though "at or near zero, an uncertainty figure cannot be attained." The Navy concludes that, "based on the requirements in the specification and accepted industry practices, the contractor should be able to adequately define the lower limits."

ANALYSIS

There is no legal requirement that a competition be based on specifications drafted in such detail as to eliminate completely any risk for the contractor. Dynalectron Corp., B-220518, Feb. 11, 1986, 65 Comp. Gen. _____, 86-1 C.P.D. ¶ 151. It is required, on the other hand, that solicitations be drafted to inform offerors in clear and unambiguous terms what is required of them so they can compete on an equal basis. See Newport News Shipbuilding and Dry Dock Co., B-221888, July 2, 1986, 86-2 C.P.D. ¶ 23. We find that the RFP here did not meet this standard. CDI's argument reasonably establishes that accurate calibration is not possible at zero force; that some definite low end of the two ranges in question is necessary to calculate the number of

^{2/} For example, according to CDI, if 103.7 lb.-ft. is the lowest force to which the uncertainty factor applies, only 4 transducers are needed, while 1.04 lb.-ft. would require 13 transducers, and .13 lb.-ft. would require 17.

transducers needed; and that it is not possible to prepare an intelligent, competitive proposal without knowing how many transducers are required to meet the Navy's needs.

The Navy's position that specifying ranges in terms of zero to some maximum number is industry practice is entirely unsupported in the record and, in fact, is contradicted to some extent. The Navy concedes that some low end limit for the ranges must be determined, recognizing that, at or near zero force, an uncertainty factor cannot realistically be attained. The Navy has presented no documentary or other evidence of industry practice, however, and has not endeavored to explain how offerors are supposed to determine the desired low ends of the ranges from the RFP itself. In contrast, CDI has submitted substantial supporting engineering information which categorically refutes the Navy's claim regarding industry practice, and includes a detailed explanation of the cost and technical impact of the absence of a low end number for the two ranges.

We think it is significant, and incongruous with the Navy's position, that low end limits other than zero were specified for the three other ranges; the Navy, again, has explained neither why, given its view of industry practice, it considered it necessary to specify low ends for these ranges, nor why its reasoning in doing so did not extend to the other two ranges.

Of further significance, CDI has presented a June 16, 1986, letter in which the Metrology Engineering Center (the same activity that prepared the technical comments in response to the current protest) amended a similar solicitation (request for quotations No. N00123-86-Q-A007) based on CDI's questioning of the absence of a low end limit other than zero to which the uncertainty percentage was to apply. The Center responded that "the point is well taken," and amended the specification to allow an uncertainty factor of " $\pm 0.5\%$ of indicated value or 0.005 lb-ft, whichever is greater." (Underlining added). This change definitized the low end of the range by allowing an error of .005 lb.-ft. at very low force, the same approach the Navy used in specifying the low end of the tension range in the current RFP.

CONCLUSION/RECOMMENDATION


We conclude that the RFP was not sufficiently definite to assure that CDI and other offerors could prepare intelligent proposals and compete on an equal basis. By leaving offerors to guess as to the lowest part of the two ranges to which the

uncertainty factor would apply, the Navy created the possibility that different offerors would assume different low end limits and thus prepare their proposals on different cost and technical bases. While this was a negotiated procurement, where discussions might have been used after receipt of proposals to clarify the Navy's intent, the RFP specifically provided that award could be made on the basis of initial proposals. Under these circumstances, CDI properly attempted to have the RFP clarified prior to the closing date so it could prepare a competitive initial proposal.

By separate letter to the Secretary of the Navy, we are recommending that the RFP be canceled and that the Navy recompute this requirement with a solicitation clearly stating the low ends of the ranges to which the uncertainty factors are meant to apply.

In addition, CDI should be reimbursed the costs of filing and pursuing the protest, including attorney's fees, since our sustaining the protest furthers the purpose of the statutory requirement for full and open competition. See Tandem Computers, Inc., B-221333, Apr. 14, 1986, 65 Comp. Gen. 86-1 C.P.D. # 362. The protester should submit its claim for such costs directly to the contracting agency. 4 C.F.R. § 21.6(f) (1986).

The protest is sustained.

for 
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of the United States