



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Reel-O-Matic Systems, Inc.
File: B-232260
Date: December 21, 1988

DIGEST

Where an agency makes an award of a trailer contract based upon a tire specification which the agency should have known was defective, the protester is prejudiced, where its offer is only \$225 higher than the awardee's offer and the differences between the prices for the specified tires and the adequate tires exceeds \$225.

DECISION

Reel-O-Matic Systems, Inc., protests the award of a contract to Tulsa Power Products, Inc., under request for proposals (RFP) No. N00600-87-R-4305, issued by the Naval Regional Contracting Center for a diesel-powered cable reel transport trailer with a hydraulic power system to load the reel and maneuver the trailer. Reel-O-Matic alleges that the Navy improperly awarded the contract based on a defective tire specification and subsequently accepted a "no-cost contract modification" to correct this specification.

We sustain the protest.

The subject solicitation was issued on October 19, 1987. The protester states that on November 6, one of its representatives informed the designated contracting official by telephone that the solicitation's trailer unit tire specification, which called for "two (2) 10:00 x 20 x 14 tires," was inadequate for the size and weight of the trailer and the reel. The protester states that the contracting official requested that he put this in writing. The record indicates no further communication between the protester and Navy regarding the tire specification until Reel-O-Matic's proposal was opened on December 3 (the closing date, as extended by amendment 0001).

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On the closing date, contracting personnel discovered enclosed with the protester's proposal a letter dated November 17, 1987, which states, in relevant part:

". . . Reel-O-Matic Systems would like to bring to your attention some standard features of our . . . cable trailer

"SAFETY NOTE:

". . . Reel-O-Matic will provide . . . tires (14:00 x 20 x 18 ply). These tires will adequately meet the load carrying capacity

"The tires specified in the [RFP] are not of sufficient capacity to handle the reel weight not to mention there is no consideration given to the weight of the trailer itself at a speed of 55 M.P.H. highway [or] unimproved roads[.] [T]his could produce a possibly severe safety hazard for equipment and personnel."

The record indicates that the contracting officer transmitted this letter to the technical evaluators on December 9.

The initial technical evaluation of the five proposals submitted was completed by March 1, 1988.^{1/} In a data sheet transmitted to the protester during discussions, the Navy noted and accepted Reel-O-Matic's proposed larger tire size. In its revised proposal submitted on April 22, Reel-O-Matic again enclosed a copy of its November 17 letter. The revised proposals were transmitted by the contracting officer to the technical evaluators on April 29. However, when best and final offers (BAFO) were requested on May 17, the tire specifications had not been amended.^{2/} Nevertheless, Reel-O-Matic's proposals and BAFO included the larger 14:00 x 20 x 18 ply tires. The Navy made award to Tulsa at

^{1/} Four of the five proposals received in response to the RFP were determined to be susceptible of being made acceptable; the proposal submitted by the fifth offeror was found unacceptable and not susceptible to being made acceptable.

^{2/} The record indicates that the technical evaluators did not specifically respond to the contracting officer concerning the protester's November 17 letter prior to award of the contract, insofar as it complained that the tire size specification was defective.

its proposed price of \$40,995 on June 29, since it submitted the low priced offer, and, by letter of the same date, advised all other offerors of the award.

On July 11, Reel-O-Matic, whose price exceeded that of the awardee by \$225, protested to the Navy the award of the contract to any firm other than itself. In that protest, Reel-O-Matic contended that: (1) the awardee's ability to manufacture the trailer was questionable; (2) the tire specification was defective; and (3) Reel-O-Matic was prejudiced by the defective tire specification since, but for the inclusion in its proposal of the more costly larger sized tires, instead of the smaller tires called for in the RFP, it would have been the low offeror. On July 20, Reel-O-Matic provided further technical data to show that the specified tire size was not sufficient to support both the weight of the trailer and the specified carrying capacity of the trailer.

On July 12 an unsolicited offer was received from Tulsa to provide larger (16.5 x 22.5 x 18 ply) tires at no additional cost. In that letter, Tulsa stated that after it received the order it found the specified tires were too small to support both the weight of the trailer and load and that the specification was deficient in this regard. Tulsa explained that the specified smaller tires were rated to support about 15,000 pounds, while the specification requires the trailer, which itself weighs 6,500 pounds, to have a carrying capacity of 14,000 pounds. Thus, larger tires with a rating to support at least 20,500 pounds were needed.

By letter dated July 26, the contracting officer denied Reel-O-Matic's protest, while conceding the protester's allegation regarding the defective tire specifications was "apparently correct." The contracting officer stated in her decision that the determination that Tulsa was a responsible offeror was properly made and supported by the record. She declined to terminate the contract, despite the apparently deficient specification, because (1) Reel-O-Matic did not timely protest the specification prior to closing; (2) the Navy was unaware the specification was deficient prior to award; and (3) there was no competitive prejudice, inasmuch as Tulsa offered to provide adequate tires at no additional charge to the government and thus did not seek to avail itself of an unfair competitive advantage.

Reel-O-Matic then protested the award to our Office, claiming the Navy was "derelict" in not concluding that the tire specification was deficient before awarding the contract. The protester maintains that it was prejudiced by the agency's award of the contract prior to receiving a

technical determination as to the adequacy of the tire specification and the acceptance of the post-award offer of Tulsa, and that these actions violated the integrity of the competitive procurement system. Reel-O-Matic requests that the contract with Tulsa be terminated and award made to it.

As pointed out by the Navy, Reel-O-Matic's agency-level protest, insofar as it concerns allegedly inadequate tire specifications, was filed after the closing date for receipt of proposals.^{3/} Consequently, its subsequent protest to this Office on this basis is untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988).^{4/} King Nutronics Corporation, B-228596, Nov. 5, 1987, 87-2 CPD ¶ 453.

However, Reel-O-Matic is not just protesting that the specifications are defective. Reel-O-Matic also contends that the agency acted improperly in making award to Tulsa when it knew or should have known that the tire specifications were defective and that it was prejudiced. We agree with the protester.

The record shows that although the contracting officer twice requested technical advice on Reel-O-Matic's November 17 letter, she was not advised that the tire specifications were deficient. Yet, after award the Navy promptly accepted Tulsa's unsolicited offer of larger sized tires based on Tulsa's representation that the specified tires were too small. In her July 26 response to Reel-O-Matic's agency-level protest, the contracting officer

^{3/} Although the protester argued in its agency-level protest that its November 17 letter submitted with its proposal constituted a protest of the tire specification, that letter does not clearly indicate it was intended as a protest. Moreover, our Office does not consider protests filed concurrent with initial proposals to be timely filed prior to the closing date for receipt of proposals. Allen Organ Co., B-231473, June 9, 1988, 88-1 CPD ¶ 552.

^{4/} Under our Bid Protest Regulations, if subsequent to Initial adverse agency action, a protest initially filed with the contracting agency is timely filed in our Office, we will consider it, provided that it was timely filed with the agency. 4 C.F.R. § 21.2(a)(3). To be timely filed with the contracting agency, a protest of an alleged impropriety in a solicitation which is apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing date. 4 C.F.R. § 21.2(a)(1).

admitted the protester's position on the deficient tire specification was "apparently correct."

However, in its report on the protest to our Office, the Navy advises that the technical evaluators did in fact review Reel-O-Matic's position on tire size prior to award and determined that the specified tire size was adequate in light of the limited use for which the reel trailer was intended. The Navy explains that this is so because the trailer was only to be driven at slow speeds for short distances primarily on Navy installations and only used in a stationary mode. Thus, the technical evaluators concluded prior to award that the specification did not need to be changed.

Based on the record, it appears to us that the specified tires are not adequate for use even in the limited circumstances described by the Navy. As indicated above, not only did the protester twice point out during the procurement that the tires were too small to support the required weight of the trailer and load, but Tulsa, in its unsolicited post-award offer, stated that the specified tires are only rated to support 15,000 pounds, whereas they would be required to support 20,500 pounds. In this regard, paragraph 3.3 of the specifications requires the trailer to "have a carrying capacity of 14,000 pounds" and to "weigh approximately 6,500 pounds"--a total of 20,500 pounds. For this reason, Tulsa offered after award to furnish the larger, more expensive, tires at its own expense. Here, both the protester and the awardee arrived at the same conclusion concerning the tire specification based on other information, provided in the solicitation, as to the size of the trailer and the load it was intended to carry. Yet, the Navy has not refuted, or even responded to, the protester's and Tulsa's comments in this regard, but merely states that the trailers will be used at slow speeds and for short distances.

Based on the foregoing, we find that the tire specification was defective and the Navy should have known the specification was defective prior to award. In so finding, we emphasize that this is not a case where the agency acted without notice of a defective specification which was not discovered and corrected until after award. Rather, here the agency was specifically apprised of the defective specification by Reel-O-Matic prior to award, and this matter was reviewed by the evaluators, yet the agency still proceeded to award.

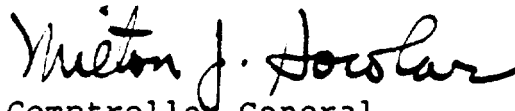
Furthermore, we find that the protester was prejudiced by the Navy's award based on the defective specification.

Reel-O-Matic recognized the tire size defect in its proposed price and Tulsa did not. The difference between Tulsa's low offer and Reel-O-Matic's offer was only \$225. The record shows that the cost difference between the specified smaller tires and adequately sized tires appears to exceed \$225. In view of the close price competition, we find that if a proper tire size had been specified, Reel-O-Matic might have been the low offeror and thus entitled to the award. See Allen Organ Co., B-230268, June 14, 1988, 88-1 CPD ¶ 570.

The protest is sustained.

Since Reel-O-Matic's protest to our Office was filed more than 10 days after award was made, contract award and performance have not been stayed pursuant to 31 U.S.C. §§ 3553(c) and (d) (Supp. IV 1986). Consequently, by this time, the trailer should have been delivered to the Navy. Therefore, we do not recommend the award be disturbed.

However, Reel-O-Matic is entitled to recover its proposal preparation costs because it was unreasonably excluded from the competition. 4 C.F.R. § 21.6(d)(2); Allen Organ Co., B-230268, supra. Reel-O-Matic is also entitled to recover the costs of filing and pursuing its protest including reasonable attorneys' fees. 4 C.F.R. § 21.6 (d)(1). Reel-O-Matic should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e).

for 
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