



United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-235608.2

February 22, 1990

Mr. Fred J. Costello
Wallace Coast Machinery Company
2151 Madison Street
Bellwood, Illinois 60104

Dear Mr. Costello:

We acknowledge receipt of your letter of November 10, 1989, concerning our decision in Wallace Coast Machinery Co., B-235608, Sept. 15, 1989, 89-2 CPD ¶ 234. In that decision, we dismissed in part and denied in part the protest of Wallace concerning request for proposals (RFP) No. N00600-88-R-4303, issued by the Navy for swing arm clamp type pipe bending machines. Your letter expresses dissatisfaction with our decision and suggests that we unnecessarily emphasized procedural (i.e., timeliness) requirements in dismissing Wallace's protest contention that the solicitation was unduly restrictive. We hope that this letter helps you to better understand the basis of our protest decision and the reason we cannot consider the matter further.

In its protest letter of May 17, 1989, Wallace essentially challenged the RFP's requirement for a "swing arm type clamp mechanism" as unduly restrictive and argued that the newer overhead clamp style bending machine it offered should have been accepted. In our decision of September 15, we dismissed Wallace's restrictiveness contention as untimely filed since our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989), require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for the receipt of proposals must be filed with our Office before that date.

Here, Wallace did not file its protest against the RFP specification until 7 months after the October 17 closing date for the receipt of initial proposals. For this reason, and the fact that Wallace did not indicate any reason why it could not have filed its protest prior to the closing date, we found Wallace's contention that the agency's specifications were unduly restrictive of competition to have been untimely filed. Although your November 10 letter does not refute our finding that the protest was untimely, you

contend we have improperly emphasized a procedural requirement and that this protest issue should be decided, not on the basis of timeliness, but upon the merits.

As we indicated in our previous decision, our timeliness rules are not a trivial matter but, rather, reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Advanced Health Sys.--Reconsideration, B-227779.2, Aug. 27, 1987, 87-2 CPD ¶ 205. In order to prevent those rules from becoming meaningless, exceptions are strictly construed and rarely used. Id. The only exceptions to our Regulations' timeliness requirements are where there was good cause for the untimely filing (some compelling reason beyond the protester's control that prevented the protester from filing a timely protest) or a significant issue (one of widespread interest to the procurement community that has not been considered before) is involved. See 4 C.F.R. § 21.2(b). Neither is the case here.

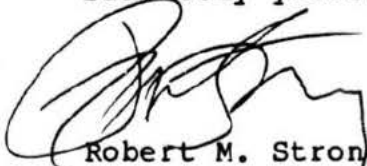
Since Wallace had the opportunity to file a timely protest of the alleged restrictive nature of the RFP but failed to do so, considering the merits of this claim would be inconsistent with our purpose of providing a fair opportunity for protesters to have their objections considered without unduly disrupting the procurement process. See Grant Technical Servs., B-235231.2, May 26, 1989, 89-1 CPD ¶ 514. To waive our timeliness requirements for Wallace's sole benefit would only serve to compromise the integrity of those rules. See The Master Collectors, Inc.--Reconsideration, B-228938.4, Jan. 19, 1988, 88-1 CPD ¶ 47.

Further, since Wallace untimely protested the RFP's failure to solicit an overhead clamp type mechanism as an alternative to the swing arm type, we must affirm our May 17 finding that Wallace's proposal for an overhead clamp was properly rejected for offering a noncomplying product. In this regard, your letter suggests that we have improperly failed to uphold a prior decision of our Office, Wallace Benders Corp.--Reconsideration, B-223624.4, Dec. 1, 1986, 86-2 CPD ¶ 618, in which we recognized that the Navy had improperly failed to amend and relax a solicitation for swing arm type bending machines, where the Navy acknowledged that both the "swing arm" and "clamp die" (or overhead) type bending machine mechanisms would have met its needs. In that case, we recommended that the Navy take steps to prevent a recurrence of such a situation.

Despite our belief that Wallace's May 17 protest was untimely filed, we have nonetheless once again reviewed that

1986 decision as you requested and simply do not find it to be controlling precedent for Wallace's present contention that either type of mechanism should have been considered acceptable under the RFP in question. As stated above, in that earlier case, we recommended that the Navy take corrective measures in the future to allow both types of mechanisms where the Navy determines that either mechanism will meet its needs. The Navy, in response to Wallace's May 17 protest, however, specifically determined that only the swing arm type mechanism would meet its needs. In fact, we find that the Navy here followed our prior recommendation and took appropriate corrective action in canceling the original solicitation it had issued in 1987, for swing arm type mechanisms (RFP No. N00600-87-R-3070), after it determined that two separate solicitations, one for either swing arm or overhead integral clamp types, and the other (RFP No. N00600-88-R-4303--the subject of Wallace's protest) for only swing arm type mechanisms, would best reflect its actual minimum needs. Because there is no reason in the record before us to question the reasonableness of the Navy's determination here (based on training and tooling concerns) that it requires only swing arm mechanisms under the specific RFP in question, we do not find our 1986 decision to be controlling since in that procurement, unlike here, the agency conceded that either product would meet its needs.

Sincerely yours,



Robert M. Strong
Associate General Counsel