



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

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B-178154

May 17, 1973

The Honorable Earl L. Butz  
The Secretary of Agriculture

BEST COPY AVAILABLE

Dear Mr. Secretary:

Reference is made to a letter (6320 Contracting) dated March 23, 1973, from the Director of Administrative Services, Forest Service, and prior correspondence, requesting our decision with respect to the protest filed by the Wayne Manufacturing Co. (Wayne) against my award of a contract to the Edward R. Bacon Company (Bacon), under invitation for bids (IFB) No. R5-73-149, issued by the Forest Service, San Francisco, California, for furnishing six brush chippers.

The contracting officer proposes to sustain the Wayne protest, reject the low bid of Bacon (\$3,950 each) as nonresponsive, and award the contract to Wayne (\$4,101 each), the only other bidder responding to the IFB. For the reasons hereinafter stated, we conclude that the IFB should be canceled and the requirements thereunder readvertised. In reaching this conclusion, we have considered comments from both Wayne and Bacon which took into account the possible cancellation of the IFB.

The bidding schedule of the IFB called for a brush chipper in accordance with an attached specification which provided in section 220 as follows:

Power transmission from engine to the cutter head shall be of a sufficient amount of multiple V-belt drive to insure adequate speed and power of cutter for chipping a 6 inch minimum log. Design shall allow for easy adjustment and replacement of the V-belts. A suitable guard shall enclose the drive unit. An emergency cut-off switch shall be included which shall be connected to a control located within easy reach of the operator in the feeding apron area. The switch must be able to turn off the cutter head assembly upon activation of the control.

That section of the specification is supplemented in the bidding schedule as follows:

A braking system will be provided that will stop the cutter blades instantly upon activation of a control switch that is easily reachable from the apron feeding area.

[Readvertisement of Requirements]  
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Wayne's original protest to the contracting officer stated that the Bacon bid was nonresponsive in several respects. But the protest has crystallized to encompass the effect of the above-quoted section 220, as supplemented. The contracting officer reports that an engineering division equipment specialist reviewed the protest file and found no reason to disagree with the Wayne position that the positive braking system called for in section 220, particularly in the supplementary language, is not a feature of the brush chipper offered by Bacon.

The Bacon brush chipper features an electrical push switch which when activated breaks the electric circuit, severs the engine's electrical functions, and thereby stops the cutter blades. With respect to the requirement that the cutter blades stop instantly, Bacon states that depending on the load in the cutting blades, its equipment will stop in from 3 to 15 seconds. Wayne's equipment, employing a responsive positive hydraulic brake system, as opposed to Bacon's use of only an electrical cut-off feature, stops the cutter blades in 2 seconds, regardless of load conditions.

The contracting officer recounts a prebid opening conversation with a representative of Bacon's supplier and his interpretation of the information imparted as follows:

In clause "220 - Drive" above, Bacon refers to a 12/18/72 telephone conversation between Karl Schoepfer of KPS Manufacturing, Inc., (KPS) and the undersigned. KPS confirmed the conversation in its letter of 1/19/72. The caller wanted to know if, under Clause 220, a hydraulic or electric braking system was required. He was informed that since the clause made no distinction, any system that produced the stated results would be in compliance. This conclusion could be reached independently by any bidder. While Clause 220, as supplemented, calls for a "braking system that will stop the cutter blades instantly," the word "instantly" was not defined and a reasonable interpretation will suffice whether the result is reached by hydraulic or electric means.

As the contracting officer states, the word "instantly" in section 220 was not defined therein. In our view the word "instantly" as used in the specification leaves no room for the contracting officer's stated willingness to accommodate reasonable tolerances from the normal accepted meaning of the word. Viewed in this light, both bids might very well be considered nonresponsive to the "instantly" requirement. Furthermore, we agree with the contracting officer, despite his seemingly erroneous but inoperative advice given to Bacon's supplier before bid opening that an other-than-positive braking system would be acceptable, that the Bacon bid is nonresponsive in that regard.

In any event, the contracting officer advised our Office that the positive braking system and instant stoppage of the cutter blades requirements contained in section 220 exceed the needs of the Government and would be deleted upon reprocurement. Even though such is the case, we could not permit the stated requirement to be waived for the low bidder, Bacon. This is so because a waiver could represent a departure from the advertised specifications and would operate to the competitive prejudice of Wayne whose optional braking system costs \$265 and the two bids are only \$151 apart. See B-174391, April 5, 1972, and 51 Comp. Gen. 237, 240 (1971) and section 1-2.605 of the Federal Procurement Regulations.

The contracting officer has admitted that the needs of the Government are overstated. Moreover, Bacon, one of the only two bidders responding to the IFB, is clearly nonresponsive thereto because of the reflection of that overstatement in the IFB. Therefore, and in the absence of any evidence that the Bacon equipment would not satisfy the actual needs of the Government, the specifications are unduly restrictive of competition. In these circumstances, while it is regrettable that bid prices have been exposed, the IFB should be canceled and the requirement readvertised with specifications deleting the restrictive requirement. See B-169919, June 16, 1970, and FPR 1-2.404-1(b)(1). The specifications on readvertisement should specify whatever reasonable tolerances are acceptable to the Government with respect to the time period for the stopping of the cutter blades. See 51 Comp. Gen., supra, at page 242.

One further matter deserves comment. Section 111 of the specifications states:

Minor deviations from this specification may be allowed where bidder has indicated in detail the manner in which his offered units differ from this specification. The Contracting Officer's decision will be final as to acceptability.

We have stated that clauses allowing deviations have no place in formally advertised procurements since they do not generally permit free and equal competitive bidding. See 51 Comp. Gen. 518, 522 (1972), and B-177532, March 26, 1973. Therefore, we believe that, on readvertisement, the section should be eliminated.

Sincerely yours,

Paul G. Dembling

For the Comptroller General  
of the United States