8759 B-Jurisdiction Protest

DECISION

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

FILE: B-189214 DATE: December 27, 1978

MATTER OF: Constantine N. Polites & Co.

[Protest of Specification Provisions in Request for Proposals]

DIGEST:

1. Government agency is not required to furnish solicitation drawings provided it can otherwise state requirements clearly.

2. Adequacy of competition depends not only upon number of offers received, but also on whether solicitation overstated Government's needs.

3. Objection to agency's refusal to use metric standards in specifying parts will not be considered to extent objection is founded on view that action taken is contrary to departmental policy, since such policy matters do not involve questions concerning legal propriety of procurement.

4. Complaint regarding delivery and inspection terms included in amended solicitation is rejected where protester failed to show basis for belief that such items are unduly restrictive.

5. Although it is incumbent upon procuring activity to establish prima facie support for reasonableness of allegedly restrictive specification, burden of proof remains with protester to show that requirement is arbitrary. To the extent that various design features are supported by balanced evaluation, they are not required arbitrarily.

6. Specification restricting type of steel to be used and requiring certain other design characteristics is not shown to be prima facie reasonable, where requirement is intended to limit component size, configuration and weight and where in fact procuring activity has not limited the size or weight of the components in question.

[Protest

~~B-03094~~

Constantine N. Polites & Co. (Polites) protests various provisions in RFP N00406-77-R-0381, issued by the Naval Supply Center, Bremerton, Washington (Bremerton). A contract was awarded notwithstanding the protest.

Bremerton sought to purchase scaffolding components, including tubing, end fittings, and couplers for use by the Puget Sound Naval Shipyard. Similar couplers were the subject of our decision in Constantine N. Polites & Co., B-187721, June 7, 1977, 77-1 CPD 401.

Scaffolding or "staging" is erected by assembling lengths of pipe to form a structure. The pipe or tubing is stocked in standard lengths and is joined end-to-end using interconnecting fittings. Couplers are used to fasten adjacent members. Among other items, Bremerton sought to purchase quantities of tubing with end fittings and right angle (90°) standard couplers.

Polites manufactures tubing utilizing fittings which differ from those specified in this instance, but recognizes that the existing tubing stock and the need for interchangeability dictate the purchase of tubing with compatible fittings. Polites states that it is willing to manufacture such a product. Nevertheless, Polites argues that the Navy should more fully describe its requirements, urging specifically that the Navy should provide solicitation drawings of the fitting needed.

Polites also complains that the coupler specifications used were unduly restrictive in that they were written to favor a particular vendor's product. In this regard the specifications required that offerors furnish a:

> "Coupler 2 inches x 2 inches, fixed, standard, to be Tubelox #A-120 or equal, as manufactured by Patent Scaffolding Company, in accordance with Section F.1."

As amended, Section F.1 required use of hinge pins, eye-bolt pins and swivel pins made of AISI-1030 to AISI-1040 annealed steel, coldhead riveted into place. Coupler bodies and caps were to be made of AISI-1025 to AISI-1040 drop-forged steel which was to be hot-dipped galvanized. Details of clamping bolts were also specified. Moreover, the coupler was to be right-handed and designed to assure 4-inch separation when couplers are butted against each other. The essential difference between an eye-bolt and T-bolt design is the use of an eye-bolt and hinge pin to

fasten the open end of each side of the coupler rather than the use of a T-bolt and socket arrangement. Bremerton defines a "right-handed" coupler with the following example

> "* * * when a worker is using the left hand to install one half of the coupler on a horizontal pipe from underneath (horizontal hinge pin on bottom), with the clamping nut facing the installer, the clamping nut on the vertical half must be on the right hand side of the vertical pipe readily accessible to the right hand of the installer."

Polites contends that Bremerton was not justified in requiring right-handed couplers only or in limiting competition to couplers which utilize an eye-bolt design. In Polites' view, Bremerton primarily should rely on performance rather than design specifications. Polites complains that certain of the materials specifications are unneeded, and that metric standards should be used in specifying the size of nuts to be used. Although Bremerton's requirement that the couplers furnished be designed to assure 4-inch coupler separation to maintain uniform spacing between adjacent longitudinal and lateral structural members, and thus, a level platform, Polites argues that use of couplers having different center-to-center dimensions would not result in an unsafe condition. At most it would result in a difference of only $\pm$ 1/2 inch, measured from the center of the platform. Polites argues that level conditions can be obtained by using couplers having similar characteristics in similar positions. Finally Polites questions certain delivery and inspection provisions, arguing that point of origin should be permitted to be used as the point of inspection and acceptance, for the convenience of offerors.

Polites' contention that solicitation drawings should be provided is a matter falling within the sole discretion of the procuring activity. However desirable or convenient the use of drawings might be in a particular instance, there is no legal requirement that drawings be furnished as part of a solicitation package. All that is required is that a procuring activity state its requirements unambiguously. Orthopedic Equipment Co., B-189971, May 23, 1978, 78-1 CPD 391. Bremerton states that "Tublox"

> "is a common name in the scaffolding industry which conveys both an implied level of quality and an exact description of what is required for compatibility."

Compatibility imports the notion that two things are capable of existing together in harmony--of being interchangeable in the sense that parts which are required to work or connect together will do so. See, e.g., Webster's Third New International Dictionary, 463 (1961). So stated, the Navy's requirement is simply that the tubing should be capable of joining in the described manner--one quarter turn of one tube locking two tubes together to form a flush joint. We see no basis for objection to the specification as written.

Secondly, even though performance specifications generally may be less likely to place undue restrictions on competition there is no legal proscription on the use of design specifications, provided that the requirements as stated are not unduly restrictive and accurately reflect an agency's minimum needs. G. A. Braun, Inc., B-189563, February 1, 1978, 78-1 CPD 89.

Polites' contention that metric standards should be relied upon in specifying the size and threads of nuts and bolts, to the extent it is based on Department of Defense (DOD) policy, likewise raises no cognizable legal issue. How that policy is implemented is a matter between DOD and the Navy. Whether the policy has been properly followed involves no question going to the legal propriety of the procurement, such as may be considered through a bid protest. Cf., e.g., Rand Information Systems, Inc., B-192608, September 11, 1978, 78-2 CPD 18.

Turning to those matters which Polites contends evidence the unduly restrictive nature of the Bremerton solicitation, we are met with the contracting officer's view that the specification was not restrictive, because offers were received from 5 firms in addition to Polites. This Office has frequently stated that the number of offers received is not a measure of whether specifications are unduly restrictive, because maximum competition is not achieved if the offers received are based on solicitation requirements which overstate the Government's needs. See, e.g., Penske Detroit Diesel Allison, B-190658, May 16, 1978, 78-1 CPD 373.

In our decision in the first Polites case, supra, we noted the Navy's intention to develop a Military Specification covering scaffolding components. We supported that effort, and we remain convinced that standardization resulting from a Military Specification is highly desirable. In this regard, we are advised that this work is well along.

We have been furnished a copy of a proposed specification, which we understand reflects the originators' evaluation of various suggested requirements solicited from Navy users, including Bremerton. The draft military specification being circulated is primarily written to reflect performance requirements, does not distinguish between so-called right- and left-handed clamps, does not insist upon the four inch separation, and defines the bolt design other than in terms of the eye- versus T-bolt controversy.

It is incumbent upon a procuring activity to establish prima facie support for its contention that restrictions it imposes on competition are reasonably related to its needs. The adequacy of its explanation will be evaluated not simply in regard to the reasonableness of the rationale asserted, but by examining the analysis given in support of those reasons. American Air Filter Co., 57 Comp. Gen. 567 (1978), 78-1 CPD 443. Not infrequently, however, procuring activities may come to different conclusions regarding the necessity for a particular requirement, even on the same facts. The burden of proof remains with the protester to show that the requirements complained of are clearly unreasonable.

The proposed military specification differs from the Bremerton solicitation in certain areas involved in this protest. This suggests at least that reasonable minds may come to different conclusions as to the need for those requirements. Differences in and of themselves do not demonstrate, as Polites suggests, that Bremerton's position is unreasonable.

Polites has provided no basis for its belief that Bremerton's requirements regarding delivery, inspection and acceptance imposed an undue restriction on bidders.

Regarding the remaining issues going to restrictiveness, the contracting officer argues that Bremerton had to protect itself against the difficulties which conceivably might arise from mixing components having "different salient characteristics." He further asserts that the number of staging bents (structures) which are constructed each year are such that labor costs far exceed the cost of the components used. In his view, production rhythm and the rate at which assemblers could work would be destroyed if the assembler were required to examine each coupler to determine how it should be oriented and what size wrench must be used.

As we see it, the dispute is not over whether Bremerton could protect itself against risks resulting from mixing different components. It could. The Navy may standardize parts to be used on a particular job to assure uniformity, provided that standardization is rationally supported by the circumstances governing the use to which those parts are to be put.

To illustrate, we see no basis for objecting to Bremerton's insistence upon couplers which assure that, "when two couplers are butted against each other on the same pipe, the distance between the centers of the two couplers shall be 4 inches." In the absence of stated tolerances, nothing more than a nominal dimension is indicated. The advantages of a design which will assure uniform spacing are in our view self-evident. That a 4-inch separation was selected is explained as desirable because the existing stock of couplers meets a 4-inch standard. In the circumstances, we see no basis for objection to this requirement.

On the other hand, Polites, going beyond the policy argument, sees the Navy as improperly restricting use of metric standards by specifying, without regard to metric dimensions, the size and threads of the bolts and nuts offered. We might agree with Bremerton that it can reasonably insist that riggers be able to use one wrench universally while assembling staging as a matter of safety and expediency. However, the Navy does not dispute Polites' contention that the same size wrench can be used whether the nut on a particular coupler conforms to an English system standard, or to the equivalent metric measure. The threads might differ, but Bremerton offers no explanation as to why it could not stock both a standard English and a metric equivalent threaded part for use by its maintenance shop with a nut size compatible to both English and metric standards.

Further, standardization is rationally supported only to the extent that the specification is complete. Bremerton explains the need to specify the material composition for coupler components as follows:

> "The reason for calling out any steel specification for coupling components is to limit the component size and/or configuration and weight with respect to strength. * * *. Specifying the quality of metals to be used in the manufacture of the components is necessary to ensure that safety of

> personnel is not compromised. The quality of the product can be met by either AISI 1030 or 1025 for hinge pins or by AISI 1025 or 1008 for coupler bodies since physical characteristics are near enough that heat treating can make up for the difference in strength. * * *."

And, further:

> "Additionally, the requirement for a certain type of steel meeting a minimum specification is a necessity to ensure that strength and quality are maintained throughout the product. Performance criteria alone, without knowledge of the steel quality, are meaningless since performance tests could only ascertain the performance of the specific item(s) tested (as opposed to the entire order or series of orders), and could not provide assurance that the part would withstand repeated varying stress loads over a period of time. The use of steel specifications is universal throughout industry."

In a similar vein, the contracting officer continues,

> "Steel specifications provide a measure of the steel's ability to perform under the particular circumstances in which it is to be used and permits * * * engineering calculations as to the safety of a particular staging configuration. Since the Shipyard utilizes staging in some rather unique applications, it is necessary to have the ability to design the configuration. * * *."

The relevant "salient characteristics" or specifications included in the solicitation did not identify: (1) the geometry--or size--of the coupler (except that the 4-inch separation requirement had to be met) or any of its components, other than that the nuts were to be standard 7/8 inch heavy hexagonal nuts and that bolts were to be 1/2 inch - 13NC eye bolts or (2) the overall allowable weight of either the coupler or its components. Required heat treatment was not specified in either specific or general terms with regard to the coupler bodies. The coupler was required only to be heavy enough, i.e. strong enough, so that with the "clamping bolt torqued to 50 foot-pounds [it would] not slip on a clean dry pipe with a load of 2,500 pounds applied in parallel to the pipe."

If use of steel specifications is common--usually in conjunction with other design detail--Bremerton's desire to assure comparable quality throughout the product could have been met by simply saying that uniformity was required. The AISI standards do not completely define steel quality, while the amount of stress imposed on any part depends both on the load and the area affected, i.e. on the geometry of the part. Merely indicating a range of steels will not permit a determination of the size, configuration, or weight of a coupler. In the circumstances, we question how Bremerton's method of specifying steel, without more, can assure the safety of personnel.

Regarding the use of a T-bolt rather than eye-bolt design, the Contracting Officer alludes to what he terms "the inherent awkwardness of the T-bolt coupler" and refers us to the comments of Bremerton's technical personnel, who state that:

> "* * * [The] 'eyed drop bolt' * * * is capable of swinging in a single radial plane, into and out of an eared slot for assembly/disassembly. The proposed 'T bolt' is capable of the same motion and functions, however, it has two additional movements, one axially along its centerline and one radially around its centerline. A combination of the last two movements can cause the bolt to shorten-up and lock-up so that assembly engagement cannot be accomplished. Material furnished to the existing specifications is capable of proper alignment before tightening with the assembler using only one hand for the clamp. This makes for rapid assembly of staging due to the assembler's other hand being free for other uses. The proposed 'T bolt' could require the use of one, two, or three hands depending on the position of the 'T-bolt.'"

There seems to be no dispute by the parties that the use of a T-bolt versus an eye-bolt design (or for that matter, "right-" versus "left-handedness," as discussed next) has any bearing on the proper orientation of the installed coupler or on whether couplers of either type can be made sufficiently strong to perform their function if properly installed. Also, Bremerton's desire to require designs limiting bolt motion to a single degree of freedom could not preclude T-bolt designs exhibiting that characteristic. We agree that a design restricting bolts to a single degree of freedom is simpler to install.

In this connection also, our concern results from Bremerton's failure to specify geometry and maximum coupler weight--or even to indicate that geometry and weight are salient characteristics. In Polites' current T-bolt design, the open side of the T-bolt socket is sealed by the pipe enclosed by the opposite side of the coupler, resulting in little difficulty effecting a normal installation using only one hand, provided that the rigger handles it by holding the first T-bolt to be connected, rather than by grasping the coupler body. We recognize that there may be cirsumstances in which this assembly technique could not be used. However, since some available eye-bolt couplers weigh twice as much as Polites' T-bolt version, Bremerton should have considered the extent to which weight itself will become a complicating factor. Whether an installer having an average size hand can conveniently reach to close the bolt (on whichever design) while holding the coupler in position with the same hand is seemingly of equal importance.

Bremerton presents additional argument in support of its desire to exclude T-bolt designs, stating that:

> "The 'eye-bolt' type of clamping bolt is preferred to the 'T-bolt' type not only because it makes the clamp a bit easier to position and install with one hand, but also because it is considered more convenient to replace an eye-bolt with stretched threads than it is to replace a T-bolt with stretched threads. When the threads are stretched from over-tightening, the nut cannot be backed off. In this case the eye-bolt hinge pin can be driven out and the eye-bolt can be removed and subsequently replaced. In the case of a T-bolt, the T-head of the bolt is recessed and inaccessible and the hardened shank of the bolt must be cut to remove the T-bolt."

Bremerton does not contend that the T-bolt cannot be cut, only that it "considers" it less "convenient" to remove. The solicitation does not specify how the bolts were to be heat treated, and in this regard, provide only that the coupler was to have sufficient strength so that, as stated earlier, it could withstand tightening to a torque of 50 foot-pounds, holding the coupler with a 2,500 pound lateral load. The frequency with which repairs would have to be made at all must depend upon the ability of the bolt to withstand thread damage. Moreover, a new T-bolt is easier to replace than is a new eye-bolt.

It simply can be slipped into position, while installation of an eye-bolt requires that a hinge pin be riveted in place. Bremerton's belief that the eye-bolt design is more cost effective to remove during replacement further assumes that the hinge pin holding the bolt will not deform to prevent its extraction. It is our understanding that the destructive testing conducted at Norfolk in connection with the first Polites case indicated at least under the conditions tested that the hinge pins deformed and failed.

Contrary to the apparent belief of more than one of the parties, we agree with Bremerton that there is a real design difference between the so-called left- and right-handed coupler, making it immaterial that "right-handedness" may happen to be a concept conceived by Bremerton. Even though riggers work in a variety of positions, Bremerton may select right-handed couplers if doing so reasonably could be expected to enhance productivity. Riggers are more likely to be right-handed than left-handed. If the rigger can use both hands, we believe it is also reasonable to assume that he or she will normally prefer to handle the coupler with the left hand, leaving the right hand free to tighten the bolts. Assuming horizontal and vertical members are being fastened with the left handed coupler, and that the horizontal pipe happens to be located between the vertical pipe and the rigger, one must reach around the vertical member to tighten the rear nut. This would not occur in the case of the right handed coupler. In the circumstances we believe that Bremerton could reasonably conclude that the left-handed coupler is inherently less advantageous, justifying its conclusion that a right-handed design could enhance productivity.

To summarize, the specification of material composition without providing weight and size parameters for the end item is questioned. We also question the restriction against use of a T-bolt design because weight and size should have been taken into consideration and because the specification as written would prevent T-bolt designs from being offered even if they were designed to exhibit the swinging motion found desirable in the eye-bolt coupler. In addition, the Navy has not justified its exclusion of metric threaded parts. Accordingly, Polites' protest is denied in part and sustained in part.

Nevertheless, we believe that the award should not be terminated for the convenience of the Government and that other remedial relief should not be recommended.

Polites' existing couplers do not meet several of the requirements discussed which Bremerton may insist upon. Polites offered only to furnish couplers meeting its existing design. We understand that Polites intends to retool and redesign its components so that they will conform to the military specification.

However, inasmuch as this procurement again emphasizes the importance of completing the military specification, we are requesting by letter of today that the Secretary of the Navy direct that contracting personnel defer future procurements of scaffolding components wherever possible, pending completion of the military specification. In making this request, we recognize that instances may arise where the Navy would have to purchase limited additional quantities of such materials. Nevertheless, we believe that deferring procurements wherever possible will best assure that meaningful competition will be achieved.

R.F. Keller

Acting Comptroller General
of the United States