

Protest of) Date: November 19, 1992
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WHELEN ENGINEERING COMPANY)
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Solicitation No. 396138-92-A-0118) P.S. Protest No. 92-56

DECISION

Whelen Engineering Company ("Whelen") protests the terms of Solicitation No. 396138-92-A-0118 for strobe lights for use on rural carrier vehicles. The solicitation was issued by the Oklahoma City Division Contracting Office on May 29, 1992, with an offer due date of June 15. Whelen's main contention is that the solicitation requirements are unduly restrictive of competition.

The solicitation sought offers on a brand-name-or-equal basis for a total of 1,060 safety strobe lights to be delivered to three different Postal Service facilities. Section 1.3 of the solicitation listed the following brand-name and manufacturer: "Star Flash II, Model LL400, [m]anufactured by Lectric Lites Co., 5600 Midway Rd., Fort Worth, TX 76177." It also enumerated the following essential characteristics for those offerors who wished to submit an offer for an equal product:

- Overall Height - 6" to 7"
- Base Height - 2"
- Lens Diameter - 5 1/2" to 6"
- Weight - 3 Lb. to 4 Lb.
- Base - 1/2" Thick Cast Aluminum
- Case - Anodized Aluminum
- Lens Ring - Lexan
- Magnetic Mounting Base - 200 Lb. Pull Magnet
- Flash Rate - 60 to 80 Flashes Per Minumte [sic]
- Output - One Million Candlepower or equal in Joule
- Cigar Plug - With 10' to 12' Cord
- Color - Amber

Temperature Range - Ability to perform in Sub Zero
Temperature [sic]

Section 3.8 of the solicitation, entitled, "Brand Name or Equal," further stated, in part, that:

One or more items called for by this solicitation have been identified in the Schedule by a brand-name-or-equal product description. Proposals offering equal products will be considered for award if these products are clearly identified and are determined by the Postal Service to contain all of the essential characteristics of the brand-name products referenced in the solicitation.

The solicitation stated that award would be made to the responsible offeror whose proposal conformed to the solicitation and offered the best value to the Postal Service. Since no price-related or evaluation factors were outlined in the solicitation, the basis of award was price.

On June 4, prior to submitting its proposal, Whelen's District Marketing Representative visited the Oklahoma City District Contracting Office to discuss the sample strobe light, the Austin 2000 series, that his company had sent to the Contracting Office for evaluation. The Marketing Representative asked the Procurement Specialist if its sample light met the requirements of the solicitation and was informed by the Procurement Specialist that the Austin 2000 series light did not have a two inch anodized aluminum base, as required by the solicitation, and was not considered an equal product without it.

On June 11, Whelen sent a letter to the Safety Manager of the Oklahoma City District Office, with a copy to the Procurement Specialist. In this letter, Whelen asserted that "most external lamps installed on moving vehicles must meet minimum standards set forth by Federal Standard FMVSS 108 and testing parameters/procedures of the Society of Automotive Engineers (SAE)." Whelen expressed its concern with the solicitation's failure to require the strobe lights "to meet any nationally-recognized program for testing or certification of warning lamp devices, such as SAE-J1318." Whelen claimed that the specifications in the solicitation were quite general in scope and failed to include any "intensity ratings, current draw maximums, or other important performance specifications such as durability, vibration, moisture, corrosion, warpage, [and] color . . . that are included in the SAE test criteria." Whelen explained that mandating the strobe lights to meet SAE minimum standards would add little to the cost, but would guarantee that they were tested by a recognized test laboratory. Whelen pointed out that by using the brand-name lights, the Postal Service was subjecting itself to potential tort liability since these lights did not meet the SAE minimum standards. In its conclusion, Whelen stated that the models it planned to

offer would be SAE certified products. It also offered to hold a meeting with Postal Service representatives to discuss this issue.

Sometime between June 12 and June 15, Whelen submitted a "primary bid" and two "alternate bids"^{1/} in response to the solicitation. In its primary proposal, Whelen offered the Whelen 1400-OPO Strobe Light. In its first and second alternate proposals, it offered Whelen Model 1410-OPO and 1420-OPO, respectively. The strobe lights offered in its primary proposal were the least expensive, followed by the lights offered in its alternate proposals. Each of the three proposals specified that the Whelen model being offered had a base height of two inches and an anodized aluminum case.^{1/}

After submitting its proposals, Whelen's Regional Sales Manager requested a meeting with the Procurement Specialist to bring in samples and discuss the strobe lights it had offered. This meeting was held on June 26. The record reflects that the Regional Sales Manager inquired as to whether Whelen's strobe lights met the requirements of the specifications, but before he was given an answer to the question, he stated that he knew that the Procurement Specialist would say that the light did not meet the two inch base requirement. The Procurement Specialist informed the Sales Manager that he was correct that Whelen's light did not meet the requirements for a two inch base and an anodized aluminum case. The Procurement Specialist also informed Whelen's representative that without the two inch base, its light was not as strong as the light specified and was more likely to be broken by flying rocks.

On June 30, the contracting officer determined that all offerors were in the competitive range. By letter, dated June 30, the contracting officer informed Whelen that its strobe lights did not meet the requirements of the solicitation since they did not have the required two inch base and the anodized aluminum case. The letter advised Whelen that in order for its proposal to be considered any further, it had to submit a revised product that met the solicitation requirements. Finally, it asked Whelen to submit its BAFO by July 13. On July 6, Whelen's representative called the contracting officer and asked him to send Whelen information on how to file a protest. This information was sent by facsimile that same day. Whelen's protest was received by this office on July 14.

In its protest, Whelen claims that the lights it offered "meet or exceed the technical and performance parameters of the bid specification in every way, but seem to lack an 'aesthetic' requirement which has no operational validity and is non-functional in nature." (emphasis omitted). Whelen states that it has tried to focus the Postal

^{1/} The use of the term "bid" is incorrect because it is a term of art applying only to formally advertised procurement procedures. This solicitation was issued under negotiated procurement procedures where the appropriate terms of art are "proposal" or "offer." Deluxe Craft Manufacturing Company, P.S. Protest Nos. 90-24 & 90-33, August 2, 1990.

^{2/} Although it is not clear from the record, it appears that there were four other offerors besides Whelen.

Service's attention on the more important technical and performance aspects of the product and on the certifications required by most state and government motor vehicle codes, but has had little success in doing this. The protester states that with the exception of the June 30th letter requesting its BAFO, Whelen has received no response to its concerns.

Whelen asserts that it is the largest manufacturer in the United States of strobe beacons for vehicular use. It claims that the products it submitted meet all the criteria that "normally surrounds the purchase of such a product" and meet almost every requirement on the Postal Service's solicitation. It alleges that its product costs less than the brand-name product and can save the Postal Service a substantial amount of money. Whelen further disputes the contracting officer's finding that its product does not meet the two inch requirement, claiming that part of the base height is inside the light. It claims that the function of the anodized aluminum case "is fully duplicated by the [two] inch high enclosed cast aluminum base with rubber "O" ring lens sealing gasket as well as a bottom base gasket that prevents water from entering the unit." Whelen reasserts that its unit has passed the SAE-J1318 test criteria which includes critical performance requirements for "vibration, moisture, dust, corrosion, photometry, color, flash rate, durability, warpage, high temperature, and low temperature."

Whelen further claims that units almost identical to those submitted in response to this solicitation have been purchased under GSA contracts in volume by other post offices around the country. It points out that similar strobe beacons, as well as other Whelen products, are used extensively within Whelen's local community by the Oklahoma Police Department and the Oklahoma Department of Transportation.

In concluding, Whelen claims that non-functional requirements, such as the requirement for an "anodized aluminum case," which can only be provided by one manufacturer, make this solicitation very narrow in its scope and limit competition. Whelen asserts that the Postal Service could have a technically superior product at a lower cost if the requirement was eliminated. Whelen requests that we reevaluate the minimum requirements for strobe lights under this solicitation.

In his statement, the contracting officer explains the background of this procurement. He states that a team of rural carriers in Chickasha, OK, conducted a six month study on three different products from July through December of 1991 at the Chickasha, Guthrie and Meeker Post Offices. From this study, they recommended that the Postal Service purchase Lectric Lite LL400 or an equal product to equip rural carrier vehicles throughout the Oklahoma City Division. The contracting officer asserts that the team determined that "the essential characteristics required for the light must include the [two inch] base and [the] anodized case for durability and stability."

In response to the protester's assertions, the contracting officer states that samples of all the strobe lights within the competitive range were requested. He states that the

photographs of the five strobe lights, submitted as part of his report, clearly demonstrate that the Whelen strobe light does not have a two inch base or an anodized case. He further states that since more than one of the strobe lights that were offered met these two requirements, the solicitation is not unduly restrictive.

The protester submitted comments in response to the contracting officer's statement. First, the protester alleges that there is a "bias toward one specific manufacturer's product." As proof of this bias, the protester points out that the Postal Service did not send it a solicitation packet on the initial solicitation.^{1/} Instead, Whelen claims that it only found out about the initial solicitation by chance when it received an inquiry from a small distributor. The protester further questions the validity of the six month study conducted by the rural carrier work team, since it didn't include any products from the largest manufacturer of strobe lights.

Second, the protester disagrees with the contracting officer's assertion that the solicitation is not unduly restrictive. Whelen argues that the specifications are "elementary in their scope and detail" and have serious omissions which allow an offeror to successfully propose a strobe light "that would be no more effective than a simple flashing lamp at low intensity." Whelen discusses several of the deficiencies it perceives in the specification. It begins its discussion with the requirement for output of "One Million Candlepower or equal in Joule," claiming that the specifications do not "describe the true visible effective intensity of the strobe beacon." (emphasis in original). Whelen explains that "candle power" is not used by any recognized industry group to measure intensity from strobe beacons because most strobe beacons, including two million candlepower strobes, produce much more light in the non-visible or infrared spectrum. The protester explains that a two million candlepower strobe beacon could produce all its light in the "non-visible spectrum and [thereby] not [be] seen at all by the human eye." The protester asserts that the term "candela" or "candela/seconds" is the only true measurement technique of a strobe beacon and that the term "joule" is "only the power of energy going into the strobe tube, not the strobe output." (emphasis in original). Whelen claims that there is no direct relationship or correlation between the terms "candle power" and "joule" as used in the specification.

The protester next points out the problem it perceives with the requirement for a flash rate of "60 to 80 flashes per minute." Whelen states that while a flash rate of 60 to 80 flashes per minute is specified, the solicitation does not specify whether the Postal Service wants "single" or "double" flashes. The protester explains that a double flash "stretches out the perceived 'on time' duration of the short but intense strobe pulses of light" so that the light is seen for a longer duration.

Whelen asserts that double flash operation is now offered by almost all strobe

^{3/} Apparently, there was a solicitation issued for this same requirement in the middle of April, which had an offer due date of April 30. It is not clear from the record why a contract was not awarded on the initial solicitation or why a second solicitation had to be issued in May.

manufacturers and that most manufacturers charge little, or nothing, extra for this added feature.

The protester further claims that the emphasis placed on the requirement for a two inch base and an anodized case seems "ludicrous" since there is little attention placed on the important parts of the strobe: the strobe power supply and flash tube. Whelen explains that these two items are the engine of the product and that their failure can instantly cause the strobe light to fail. The protester states that strobe power supplies and flash tubes are available across a broad spectrum of quality and durability levels, which are not defined in the solicitation.

The protester claims that the specifications should have also included the following important features:

- 1) Helix or "U" shaped flash tube
- 2) Replaceable or permanently fixed flash tube
- 3) Easily-replaceable power supply
- 4) PC board epoxy coated for maximum vibration and moisture resistance to electronic components
- 5) Reverse-polarity protection
- 6) Sealing gasket of lens to base
- 7) Warranty on unit or power supply
- 8) Warranty on flash tube

The protester claims that on at least two occasions, Whelen's regional salesman attempted to explain these important omissions and improvements to the procurement specialist. Whelen contends that its suggestions could have significantly improved the solicitation. However, according to Whelen, the Postal Service employees with whom it met rejected Whelen's attempt to improve the solicitation, finding it to be "unnecessary."

In addressing the requirements for a two inch base and an anodized aluminum case, the protester asserts that the vast majority of strobe beacons for vehicular use do not include the aluminum base and case material specified in the solicitation. According to the protester, many of the bases are made of other equally durable materials such as fiberglass reinforced plastics and polystyrene, SuperTuf nylon, polycarbonate materials, or polished stainless steel. The protester reiterates that the base on its strobe light is two inches tall, explaining that "part of it mounts inside the lens and is not visible from the outside." The protester states that except for the anodized case, its lights meet all other parts of the thirteen requirements in the solicitation. The protester notes that it did not receive a copy of the photographs which the contracting officer refers to in his statement. The protester claims, however, that even if there are one or two manufacturers that can meet the solicitation requirements, "they are insignificant suppliers, as the vast majority do not offer these 'aesthetic' features."

Finally, the protester states that it does not understand why its products were excluded, since it is obvious that any of the three models it proposed could be used successfully for the application intended at a considerable savings to the Postal Service. The protester points out again that many of the strobe beacons it manufactures each year are purchased by government agencies under a GSA contract and have no "durability" or "stability" problems. Whelen states that all it is requesting is fairness in the evaluation of products and an acknowledgment that some of the requirements in the solicitation are restrictive and unnecessary for actual product performance.

In its rebuttal comments, the contracting officer states that the first solicitation was advertised nationally in the Commerce Business Daily and that Whelen was sent a copy of the solicitation on April 17 since it was on the original mailing list. The contracting officer points out that Whelen responded to the initial solicitation with an offer dated April 30. The protester responded to these comments by restating that after checking with its staff, it is sure that it obtained its copy of the first solicitation from a distributor, not from the Postal Service. Whelen claims that the important point was not when it received the first solicitation but the fact that if it had been allowed to participate in the six month study, it would have been able to provide important information which would have improved the specifications, eliminating their restrictive nature.

Star Headlight & Lantern Co., Inc. ("Star") submitted comments, outlining the advantages of an aluminum case. According to Star, the most important advantage of an aluminum case is its "heat sinking abilities." Star explains that all electronic circuits, especially strobe circuits, produce some heat which is very destructive to many components in a circuit, such as the semi-conductors and capacitors. Star states that two primary methods are used to relieve the heat problem. The first is to increase the efficiency of the circuit, thereby reducing the amount of heat that is produced. Star points out, however, that no circuit, is 100 percent efficient. The second way of relieving the heat problem is to design a "sufficient heat sink to dissipate excess heat by (a) using an effective heat sinking material, such as aluminum [and] (b) making certain the material being used as a heat sink is of sufficient size to dissipate the excess heat." (emphasis omitted). Star explains that aluminum is perhaps the best heat sinking base material available and that the "anodizing prevents corrosion." Star claims that a two inch aluminum base "would be more than adequate as a heat sink for many lights, but not enough for others; depending primarily on circuit efficiency."

Lectric Lites Co. ("Lectric") also submitted comments justifying the need for a two inch base and an anodized aluminum case in strobe lights. Lectric claims that the two inch height "allows the clearance required for the electronic components to be mounted on the underneath side of the printed circuit board." (emphasis omitted). Lectric states that this configuration has the following advantages: 1) The electronic components, surrounded by the aluminum case, have better protection against weather elements, including the heat of direct sunlight, ensuring higher reliability; 2) Components, such as the semiconductor, will operate cooler if they are surrounded by the aluminum case.

Without the "heat sink" advantage of the aluminum case, components may overheat leading to unreliable operation and ultimate failure; and 3) By surrounding the components with a two inch aluminum case, it "minimizes the effect of radio frequency interference of this circuit on other electronic systems installed on the vehicle." Lectric claims that strobe lights that do not contain a case to house the components are less durable and therefore less costly.

Discussion

The protester's basic contention is that the requirement in the solicitation for an anodized aluminum case is unduly restrictive of competition.^{4/} A protest challenging the requirements of a solicitation as unduly restrictive is a protest against the terms of the solicitation. Lista International Corporation, P.S. Protest No. 90-47, September 11, 1990. Although no party to this proceeding has addressed the issue of timeliness, we may do so ourselves because it affects the jurisdiction of our office to adjudicate Whelen's assertions. Coopers & Lybrand, P.S. Protest No. 89-91, March 21, 1990. "Untimely protests cannot be considered on their merits. The requirement that a protest be timely filed is jurisdictional and cannot be waived." Alabama Metal Products, Inc., P.S. Protest No. 91-20, May 7, 1991.

Procurement Manual ("PM") 4.5.4 b. provides that protests "based upon alleged deficiencies in a solicitation that are apparent before the date set for the receipt of proposals must be received by the date and time set for the receipt of proposals." Here, Whelen was aware of the requirement for an anodized aluminum case prior to June 15, the date when proposals were due. If Whelen wished to challenge this particular requirement as unduly restrictive of competition, it could have done so prior to that date. Since Whelen's protest was not received by this office until July 14, its protest is untimely and cannot be considered.^{5/}

The protest is dismissed.

For the General Counsel:

William J. Jones

^{4/} Whelen does not appear to be challenging the requirement for a two inch base since it believes that the products it offered meet that requirement.

^{5/} To the extent that Whelen's protest is alleging that there were some important features which should have been included in the list of essential characteristics in the solicitation, it is also untimely as against the terms of the solicitation for the reasons outlined above.