

DECISION



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

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FILE: B-178954

DATE: January 28, 1974

MATTER OF: Arista Company

DIGEST: Bidder's unsolicited submission of a component supplier's catalog or product information sheet which contains a pre-printed reservation that the product is subject to change without notice does not relieve bidder from its underlying obligation to furnish acceptable brand name or equal component. Prior inconsistent decision overruled.

BACKGROUND

The U.S. Geological Survey, Department of the Interior issued invitation for bids (IFB) No. 5217, for a quantity of servo-programmers and related items. The IFB listed four bid items, and stated that offers would be evaluated and award(s) made for individual items or combinations of items, whichever would result in the lowest aggregate price to the Government. The servo-programmer was to be constructed in accordance with a working prototype, developed by the agency and available for inspection, and drawings attached to the IFB. One of these drawings identified component parts for the servo-programmers by manufacturer and part or catalog number. In a number of instances it was indicated that either the listed component or an equal product could be furnished.

Bids were opened on April 4, 1973, and on June 4, 1973, contracts were separately awarded for Item 1 and Items 2, 3, and 4. On the date of award, Arista was notified by the contracting officer that its bid had been determined to be nonresponsive because descriptive literature submitted with its bid contained the statement, "This information subject to change without notice." By letter of June 21, 1973, Arista's protest to the agency was denied.

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Arista indicated on its bid that it intended to supply "or equal" products for several of the brand name component parts and it furnished literature with its bid so that the Government could evaluate the equal components it intended to furnish. The language referred to by the contracting officer is printed on a component manufacturer's product information sheet and similar language is found on another manufacturer's catalog sheet. Both documents were attached to Arista's bid for evaluation purposes.

Attachment B to the IFB contained a "brand name or equal" clause similar to the one contained in the Federal Procurement Regulations (FPR) 1-1.307-6(a). The clause advised bidders that if items were identified in the schedule by a "brand name or equal" description, such identification was intended to be descriptive, not restrictive, and to indicate the quality and characteristics of products that would be satisfactory. With respect to information for evaluating an "or equal" product, the clause cautioned bidders that:

"The purchasing activity is not responsible for locating or securing information which is not identified in the offer and reasonably available to the purchasing activity. Accordingly, to insure that sufficient information is available, the offeror must furnish as a part of his offer all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the requirements of the Solicitation for Offer, and (ii) establish exactly what the offeror proposes to furnish and what the Government would be binding itself to purchase by an award."

The administrative report states that it was not intended that the "brand name or equal" clause be applicable to the components identified in the drawing and that Arista was not required to furnish descriptive literature. In this connection FPR 1-1.307-6(b) provides that if a component part of an end item is described in the IFB by a "brand name or equal" purchase description, the requirement that a "brand name or equal" clause

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be included in the IFB will not apply if the contracting officer finds that its application would be impracticable. However, the regulation also requires that:

"In such cases, if the clause is included in the invitation for bids for other reasons, there also shall be included in the invitation a statement identifying either the component parts (described by 'brand name or equal' descriptions) to which the clause applies or those to which it does not apply."

In this case the IFB was defective for failing to inform bidders as to whether or not the subject clause was applicable to those components for which equal products were acceptable. In view of this fact, Arista's conclusion that it was required to identify clearly the specific "or equal" products intended to be furnished, and to submit sufficient descriptive data for evaluation purposes was not unreasonable. While, for purposes of this decision, we must determine whether the literature submitted with Arista's bid rendered its bid nonresponsive (see FPR 1-2.202-5(f)), we have noted the deficiency so that corrective action may be taken to avoid a recurrence of the misunderstanding which resulted in this case. See 49 Comp. Gen. 851 (1970).

DECISION

As a general rule, a bid is responsive if it complies with all material or essential provisions of the invitation for bids. A deviation from the terms of the IFB is material or substantial if it affects price, quantity, quality, or delivery. Prestex v. United States, 162 Ct. Cl. 620; 320 F. 2d 367 (1963); 40 Comp. Gen. 432 (1961); 52 Comp. Gen. 265 (1972). Inclusion of a statement in literature accompanying a bid to the effect that the product specifications are subject to change without notice has been found to be a material deviation requiring bid rejection. That has been the required result irrespective of whether such literature was actually required to be submitted. See B-158809, June 2, 1966; B-177390, March 8, 1973; B-156102, February 24, 1965; B-159178, September 6, 1966.

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We adhere to this view in those situations where descriptive data is deemed necessary by the contracting agency to permit a determination before award as to whether a component part offered by a bidder meets the specification requirements and to establish exactly what the bidder proposes to furnish. See FPR 1-1.307-6(a) and 1-2.202-5. It is clear that a statement in a bidder's submitted literature to the effect that the design specifications set forth in the literature are subject to change without notice raises a substantial question as to exactly what the bidder will furnish and therefore the contracting agency can not determine prior to award whether the component part proposed by the bidder meets the specification requirements.

However, we see no reason to follow such a rule where, as here, the descriptive data is not required by the agency to evaluate the bids. In such a case the agency does not need to establish exactly what the bidder is proposing to furnish. Rather, the bidder is merely required to agree to the specification requirements.

If a bidder submits descriptive literature as a part of its bid in these circumstances, we do not believe the inclusion of a qualifying statement on the bidder's component literature sheet to the effect that the data contained therein is subject to change without notice requires the conclusion that the bidder has reserved the right to deviate from the advertised specification, assuming that the submitted data otherwise conforms to the advertised specifications. In such circumstances the fact that the literature submitted actually described a component which was consistent with the specifications was a sufficiently clear assurance of the bidder's intention to meet the specifications. We do not think the qualifying statement created an ambiguity since here it was not a material requirement that the bidder establish exactly what it proposed to furnish and since the Government could have no valid objection if Arista chose to furnish a different component as long as that component was consistent with the advertised specifications. In our opinion it is unreasonable to read the qualifying statement as giving the bidder the right to make changes beyond the scope of the underlying specification requirements.

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Therefore, we do not believe that Arista's bid should have been rejected for the reason stated by the agency. However, we do not recommend upsetting the contract award inasmuch as a prior decision of this Office, B-156102, February 24, 1965, is inconsistent with this holding and may have been relied upon in rejecting Arista's bid. That decision will no longer be followed insofar as it is inconsistent with our holding in this case.


Deputy Comptroller General
of the United States