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DECISION



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

*B. Krashen
Proc I*

FILE NO: E-187318

DATE: February 15, 1977

MATTER OF: Vemco Corporation

DIGEST:

1. Bid submitted on brand name or equal procurement which did not contain sufficient descriptive literature to affirmatively establish conformance with salient characteristics was properly determined nonresponsive after demonstration of product revealed that offered product did not meet one of salient requirements.
2. Procuring agency determination that bid model did not meet salient characteristic of brand name or equal specification is accepted by our Office where protester submits no evidence on point and evidence of record supports agency determination after visual inspection.
3. Post-bid opening offer to substitute technically acceptable model for unacceptable model bid was properly refused since bid may not be changed after bid opening.
4. No prejudice is seen in fact that three machines of protester's competitor were in use onsite since one was acceptable as brand name product and other two were determined nonresponsive for failing to affirmatively demonstrate technical acceptability of models bid.

The Vemco Corporation (Vemco) has protested the determination of the National Aeronautics and Space Administration (NASA) that Vemco's Model 2 drafting machine did not meet the salient characteristics of the brand name or equal specification of invitation for bids (IFB) No. 1-72-6026, issued by Langley Research Center.

B-13731A

The IFB required that products be "Bruning Model 48-075, or equal." The salient characteristic here in question required:

"Vertical track shall have adjustable support roller near lower end to ride on lower edge of drawing surface but not restrict one from drawing horizontal line 1" from base of drawing surface when using either side of horizontal scale."

The "Brand Name or Equal" clause in the RFP stated:

"The evaluation of bids and the determination as to equality of the product offered shall be the responsibility of the Government and will be based on information furnished by the bidder or identified in his bid, as well as other information reasonably available to the purchasing activity. CAUTION TO BIDDERS.

"* * * to insure that sufficient information is available, the bidder must furnish as a part of his bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the procurement office to: (i) determine whether the product offered meets the salient characteristics requirements of the Invitation for Bids and (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include specific references to information previously furnished or to information otherwise available to the procurement office."

Vemco submitted the second low of ten bids received in the amount of \$129.37. Vemco bid on the basis of supplying its Model 2 and submitted its catalogue with its bid.

B-187318

The evaluation of bids was prepared by the Assistant Chief, Systems Engineering Division. Concerning Vemco's bid, he stated:

"Information furnished. - From the information furnished in the bid it is not possible to determine whether the product offered meets the dimensional requirements of items (1) and (2). No undimensional illustrations were furnished of the proposed Model 2 head assembled on a drawing board, thereby eliminating even an extrapolation to be made. The bulk of the information provided describes the Model 4 head, which is not bid, but extrapolating from the illustrations it appears that the Model 4 head may meet both item (1) and (2) requirements. Extending this extrapolation to the proposed Model 2 head it appears that it may meet item (2) requirements but not meet the item (1) requirement. The descriptive information furnished on the Model 4 head indicates the overall quality and characteristics are equivalent to the 'brand name or equal' requirement and will be satisfactory. The limited information furnished on the Model 2 head indicates the overall quality and characteristics are not equivalent to the 'brand name or equal' requirement and is considered to be unsatisfactory as further discussed below.

"Other information. - Vemco drafting machines with a head design very similar to the proposed Model 2 head have been used in Apprentice School drafting classes. The overall quality and characteristics have been marginally satisfactory as a training tool. Based upon this performance the overall quality and characteristics of the proposed Model 2 head is unsatisfactory for a long term production application, particularly regarding the reliability of the index locking design."

NASA reports that other information was available to it at the time of evaluation. This information was generated by a Vemco representative who demonstrated both the Models 2 and 4 drafting machines the day after bid opening. The Assistant Chief, Systems Engineering Division, states:

B-187318

"[T]he Model 2 head mounted on the vertical frame which fit the board clearly revealed by demonstration that it could not meet Item (1) of the specifications to draw a horizontal line 1" from the base of the drawing surface when using the top of the horizontal scale."

Two days after the demonstration, Vemco offered to substitute the Model 4 machine. This offer was not permitted.

The technical evaluation concluded that the bid of the AM Corporation, Bruning Division (Bruning), offering the brand name product, was the lowest responsive bid at \$159.59. Award was made to Bruning on August 6, 1976. NASA advises that the machines have already been delivered and accepted.

Vemco disputes NASA's technical determination that the Model 2 is not capable of meeting the requirement to draw a horizontal line 1" from the base. Vemco maintains that the Model 2 has a capacity to draw a horizontal line within three-quarters of an inch of the bottom of the board. Further, Vemco implies that a competitive advantage inured to three other firms--Dietzgen Corporation, Kooffel & Esser, and Bruning--because their equipment was in site at Langley as a result of prior procurements.

The "Brand Name or Equal" clause clearly apprised bidders of their responsibility to demonstrate to NASA that their products conformed to the salient specifications. The information submitted with Vemco's bid did not establish this. However, we believe that NASA's decision to view the machine which Vemco bid presented it with other readily available information within the meaning of the clause in the IFB, 50 Comp. Gen. 137 (1970). While Vemco now disputes NASA's interpretation of the Model 2 capabilities, we would be unwarranted in substituting our opinion for NASA's at this time. Our Office has not witnessed the actual operation, as has NASA. It is Vemco's responsibility to affirmatively demonstrate the acceptability of its offered product. While Vemco disputes NASA's determination, it has presented no evidence, other than its bare allegation, sufficient to overcome NASA's conclusion. B-176262, January 23, 1973. Therefore, Vemco's protest on this point is denied.

B-187318

Venco's offer after bid opening to supply the conforming Model 4 at the bid price was not acceptable. It is quite clear that a bid may not be varied after bid opening to cure a defect that would render the bid nonresponsive. 40 Comp. Gen. 432 (1961). To permit the substitution of one article for another after bids have been opened gives that bidder an unfair advantage over others. Therefore, the proposed substitution of the Model 4 for the Model 2 was impermissible.

Further, we perceive no prejudice in the fact that other machines were at Langley for use and inspection. Venco was afforded an opportunity to demonstrate its machine. Also, two machines other than the brand name that were onsite at Langley were also determined to be nonresponsive on the basis of the information before NASA during the evaluation. Finally, NASA also states that Mutah Model L, which was not bid, meets the specification. Thus, since there are at least three known acceptable products, the specification is not deemed unduly restrictive.

In view of the above, the protest is denied.


Deputy Comptroller General
of the United States