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DECISION



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

FILE: B-201025.2

DATE: July 8, 1981

MATTER OF: E. C. Campbell, Inc.

DIGEST:

1. Under brand name or equal procurement of electric forklift truck, low bid which parroted back solicitation list of required salient characteristics as descriptive of "equal" model offered and enclosed a manufacturer's brochure relating to other similar models produced by same manufacturer is not sufficient as matter of law to require agency to determine that bid is responsive; agency properly concluded that bid was nonresponsive for failure to provide sufficient information to permit it to determine whether product offered met required characteristics.
2. Where protester relied in part on product data and user list which it supplied to procuring activity prior to bid opening to establish that product met salient characteristics, protester assumed risk that such information would be insufficient to establish compliance.
3. Defense Acquisition Regulation § 1-1206.3(d), which permits procuring activity to provide in solicitation that bidder must provide samples of "equal" product offered in brand name or equal procurement, is elective on procuring activity, not mandatory.

E.C. Campbell, Inc. (Campbell), protests the proposed award to The Raymond Corporation (Raymond) of a contract for two 6,000-pound-capacity, electric forklift trucks under invitation for bids (IFB) No. DLA 700-80-B-1682 issued by the Defense Logistics Agency (DLA). Campbell alleges that its low bid was improperly rejected as non-responsive for failure to provide sufficient data to permit the agency to determine whether the offer was compliant with a brand name or equal requirement. Campbell argues that its bid was responsive as a matter of law. We disagree and find the protest without merit.

[Protest of Bid Rejection as Nonresponsive]

~~DLA 700-80-B-1682~~ **115721**

The IFB specified that the forklift trucks supplied were to be Raymond model 71-SL60TN, or equal, having the salient characteristics set forth in a brand name or equal specification sheet. The IFB also included the brand name or equal clause of Defense Acquisition Regulation (DAR) § 7-2003-10(c)(1) (1976 ed.), which required bidders proposing to furnish an "equal" product to furnish with the bid descriptive literature to enable the purchasing activity to determine whether the product offered met the salient characteristics of the IFB and to establish exactly what the bidder proposed to furnish. Also, if a bidder planned to modify his product to comply, the modifications were to be fully described and clearly marked on the descriptive literature.

Bids were submitted only by Raymond and Campbell. Campbell's unit price for both CLIN's was \$59,089; Raymond's price was \$66,805 for CLIN 0001 and \$64,956 for CLIN 0002. Shortly after bid opening, Raymond protested, alleging that Campbell's bid was nonresponsive. DLA then evaluated Campbell's bid for compliance with the "equal" requirement and concluded that the material submitted with the Campbell bid did not establish that the model offered met the salient characteristics and, therefore, it rejected Campbell's bid as nonresponsive. Campbell's protest to our Office followed and award is being held in abeyance pending our decision.

Campbell's bid was for the model ESTL 3.0IG Schultheis Sideloader. In a cover letter accompanying its bid, Campbell stated that this model provided features which consisted of a verbatim reiteration of the salient characteristics listed in the IFB specification sheet. In addition, Campbell's bid included a brochure containing information regarding six similar Schultheis model forklift trucks, but which did not contain any reference to the particular 3.0IG model being offered.

After receipt of the initial IFB, but prior to submission of its bid, Campbell had inquired of DLA how it could "verify the production, marketing and use of the ESTL 3.0IG for more than one year." It had submitted to DLA specifications (partly in German) for its ESTL 2.5 model and had provided DLA with a list of

several commercial users of its 3.0IG model. Campbell indicated at that time that "our model offered would be an ESTL 3.0 which is basically the same as the ESTL 2.5."

DLA concluded that the data submitted on the model 2.5 were insufficient to make a valid evaluation of the compliance of the model 3.0. DLA had checked with the one commercial user specified by Campbell which DLA felt used the forklift truck for purposes comparable to that contemplated by the requiring activity and had found the information provided inconclusive. In particular, the model being used by the firm contacted was not, in fact, a model 3.0IG. We note that while Campbell has stated in its correspondence that the model numbers refer to load capacity (2.5 means 2.5 kilograms, 3.0 means 3 kilograms), and there are no other substantial differences between the models, nowhere in the submissions to either DLA or to our agency is there any manufacturer's literature which specifically references the 3.0IG model.

Campbell contends that DLA improperly found its bid nonresponsive because: (1) it submitted its bid without taking any exception and expressly listed all of the characteristics with which it stated that the offered model was compliant; (2) it had supplied DLA with a list of commercial users from which DLA could have ascertained the compliance of the model and (3) if DLA had doubts about the compliance of the model 3.0IG, then under DAR § 1-1206.3(d) it should have obtained and tested the model.

Campbell cites National Micrographics Systems, Inc., B-196167.2, February 20, 1980, 80-1 CPD 147, and SEG Electronics Corporation et al., B-179767, May 16, 1974, 74-1 CPD 258, in support of its contention that the bid was responsive as a matter of law. In particular, it argues that these cases stand for the propositions that it is not necessary for an "equal" bid to describe how each salient characteristic will be met, and that the Government has a sufficient basis for evaluation of compliance, when, as here, the bidder offers a standard model which it indicates is fully compliant, along with illustrative material of related items. In SEG Electronics, supra, the procuring agency determined that it was satisfied with the compliance of an "equal" instrument offered in a

brand name or equal bid which provided data repeating the salient characteristics of the IFB, along with an illustration of the instrument's front panel. Our Office noted that since the bid did constitute an unqualified offer to provide an item meeting the exact specifications, we had no basis to dispute the agency determination. Similarly, in National Micrographics Systems, Inc., supra, the procuring agency was willing to determine the responsiveness of a brand name or equal bid for an "equal" item which parroted back the salient characteristics list and provided an illustration of a sister model. While we stated that "mere parroting back of salient characteristics is not sufficient to meet a descriptive data requirement," we concluded that the data plus the illustration were sufficient to enable the agency to conclude that the bid was responsive.

Both of these cases are guided by the underlying principle that for these kinds of evaluation judgments, our Office will defer to the procuring agency's technical determination unless it is clear from the record that it is erroneous or arbitrary. See Delta Electronic Control Corporation, B-188796, November 28, 1977, 77-2 CPD 412. There is no indication in this record that the determination was either arbitrary or erroneous. The Agency was not satisfied with the parroting back of the salient characteristics, and Campbell never provided any manufacturer's literature directly concerning or referencing the model it offered.

The general rule regarding the responsiveness of an "equal" bid submitted in response to a brand name or equal procurement is that it is dependent on the completeness and sufficiency of the descriptive information submitted with the bid, previously submitted information, or information otherwise reasonably available to the purchasing activity. It is not enough that the bidder believes its product equal; the Government must be able to determine equality. See Stacor Corporation; Isles Industries, Inc., B-189987, January 26, 1978, 78-1 CPD 68; Ocean Applied Research Corporation, B-186476, November 9, 1976, 76-2 CPD 393; Championship Sports Floors, Inc., B-193178, March 7, 1979, 79-1 CPD 161. In this regard, it is well settled that an offer of blanket compliance with the salient characteristics listed in an IFB, which is essentially what was provided here by Campbell's cover letter, is not an acceptable

substitute for required descriptive data on the "equal" product, Championship Sports Floors, Inc., supra; 50 Comp. Gen. 193 (1970). Had the Agency concluded from the material submitted by Campbell (prior to and with its bid) that the product offered did, in fact, comply with the salient characteristics, our Office would not have disturbed that finding on the basis of this record. However, since the Agency has determined that it had insufficient information to make such a finding, we are not prepared, on this record, to substitute our judgment for that of the Agency with respect to what is essentially a technical determination. Clearly, Campbell's bid was not, as it argues, "responsive as a matter of law."

Regarding the allegation that the user list and prior data submitted to DLA by Campbell established that the product was "equal," we find no such indication in the record. The data were submitted on a different model than that offered by Campbell. The user contacted by DLA did not have or use the model 3.0IG in question. Thus, the Agency concluded that this information was insufficient to establish the "equal" nature of the model offered. Campbell's reliance on what it believed to be complete and convincing data supplied in this regard was misplaced. The bidder, in such circumstances, runs the risk that such information will be incomplete for failure to establish that all the salient characteristics are met. Ocean Applied Research Corporation, supra.

Campbell's final assertion concerns DAR § 1-1206.3(d) which permits an IFB requirement of bid samples when "equal" models are bid under a brand name or equal requirement. As DLA has noted, the DAR provision makes this requirement elective on the part of the procuring activity, not mandatory. See John Fluke Manufacturing Co., Inc., B-187588, June 6, 1977, 77-1 CPD 394. The procuring activity was under no obligation to include this provision, nor to require tests of samples.

Accordingly, the protest is denied.


Acting Comptroller General
of the United States