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Encl. 12/11

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DECISION



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

FILE: B-203417

DATE: December 15, 1981

MATTER OF: Shepard Group

DIGEST:

1. Protest alleging defects apparent from face of solicitation must be filed prior to bid opening. 4 C.F.R. § 21.2(b)(1).
2. Bid proposing "equal" product in response to brand name or equal invitation was properly rejected as nonresponsive since proposed product did not meet all of listed salient characteristics of brand name model.

Shepard Group protests the rejection of its bid by the Internal Revenue Service (IRS) submitted under invitation for bids (IFB) IRS-81-50. Shepard's low bid was rejected as nonresponsive because the IRS determined that the product offered by Shepard in response to the brand name or equal purchase description did not meet all of the salient characteristics of the brand name model specified in the IFB. Shepard contends that its product meets the invitation's requirements.

The protest is dismissed in part and denied in part.

The IFB called for bids to provide 550 disk packs described as "IBM 3330-11 or equal," and listed a number of salient characteristics that any product offered as equal would have to meet. The IFB warned that any bidder offering other than the specified brand name product must submit descriptive material to enable the purchasing activity to determine whether the product offered met the listed salient characteristics. One of the salient characteristics was that the disk packs be "flaw free."

Shepard contends that the flaw free characteristic was confusing, causing it to believe that the IFB called for a standard product. Consequently, Shepard submitted a bid offering what it determined to be the proper "equal" product, BASF model 1246, part 53795. Shepard states that the part numbers it had when it submitted the bid were incomplete because it had just recently "signed with" BASF, and it acknowledges that the proper "equal" product is part 53962. Shepard's confusion was apparently due to the fact that BASF and Memorex literature use the term "flag free" rather than "flaw free." These terms, however, are synonymous and any possible confusion should have been removed by Amendment 2 to the IFB which defined the "flaw free" requirements.

In any event, Shepard's contention concerning the confusing nature of the flaw free requirement involves an alleged defect apparent from the face of the solicitation. Protests alleging such defects must be filed prior to bid opening. 4 C.F.R. § 21.2(b)(1) (1981). Shepard's protest on this issue is untimely because it was filed several weeks after bid opening. We therefore will not consider the merits of this issue.

The IFB required Shepard to submit descriptive material to indicate whether the "equal" product it offered was in fact equal. Shepard, however, did not include any descriptive material with its bid, but it did submit some literature in response to a request made by the IRS after bid opening. Shepard admits that the literature submitted did not specifically state that the product offered was flaw free, but it notes that the descriptive literature it had available at the time was incomplete.

Despite these apparent deficiencies, Shepard continues to assert that its offer can meet the IFB's requirements and it maintains that a communication problem has caused a misunderstanding and the rejection of its bid.

Where a brand name or equal purchase description is used, the responsiveness of an "equal" bid is dependent on the completeness and sufficiency of the descriptive information submitted with the bid, previously submitted information, or information reasonably available to the purchasing activity. Environmental Conditioners, Inc., B-188633, August 31, 1977, 77-2 CPD 166. However, the IRS did not reject Shepard's bid solely on the basis of the literature submitted by Shepard.

The IRS notes that it referred to its own BASF literature and determined that the "equal" product offered by Shepard was not flaw free.

Equal products must conform to the salient characteristics listed in the IFB in order for the bid to be regarded as responsive. Ohio Medical Products, B-192317, October 23, 1978, 78-2 CPD 295. This is so because the salient characteristics are regarded as material and essential to the needs of the Government and acceptance of nonconforming supplies would amount to a waiver of the advertised specifications. 49 Comp. Gen. 196 (1969). Moreover, a blanket offer to comply with the specification requirements does not cause the deficiency here. Data-Chron, Inc., B-196801, July 29, 1980, 80-2 CPD 79. Therefore, the rejection of Shepard's bid, which by Shepard's own admission offered a product which did not meet all of the salient characteristics required by the IFB, was proper.

The protest is dismissed in part and denied in part.

for *Milton J. Fowler*
Comptroller General
of the United States