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**DECISION**



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

**FILE:** B-210939

**DATE:** May 31, 1983

**MATTER OF:** MEMM General, Inc.

**DIGEST:**

1. Contracting agency generally has discretion to request bidders to extend their bid acceptance periods. Although bidders are free to refuse such requests and withdraw their bids, delay in award beyond original acceptance period does not provide a legal basis to challenge an award.
2. When contracting agency specifies salient characteristics of brand name product and requires descriptive data to show that they will be met, the responsiveness of an "equal" bid depends on the completeness of the information submitted or reasonably available to the procuring activity. It is not enough that the bidder believes its product is equal to--or even better than--the brand name product, or makes a blanket statement that all salient characteristics will be met; rather, bidder must demonstrate equivalency.
3. When bid on "equal" product includes neither model number nor descriptive data that would permit procuring activity to determine what it is agreeing to purchase, bid must be rejected as nonresponsive. To allow bidder to provide information after opening would give it an opportunity to make a nonresponsive bid responsive.
4. Innovative features and alleged advantage to Government that would be gained by bidder's use of large number of subcontractors may not be considered in determining lowest responsive, responsible bidder when they have not been specified in solicitation and there is no indication that evaluation credit will be given for them.

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MEMM General, Inc. protests the award of a contract for a chemical system to clean bilges and tanks aboard ships under a brand name or equal solicitation issued by the Naval Regional Contracting Center, Long Beach, California. The Navy rejected MEMM's bid as nonresponsive because it could not determine whether the "equal" system offered met the salient characteristics listed in the solicitation. We deny the protest.

The invitation for bids, No. N00123-82-B-0871 (subsequently renumbered N00123-83-B-0185), issued September 13, 1982, included a detailed list of salient characteristics covering three types of tanks (for acid, detergent, and fresh water), pumps and controls, a heat exchanger, hoses and hose reels, a control console, and an electrical and lighting system.

It also included the standard brand name or equal clause prescribed by Defense Acquisition Regulation (DAR) § 7-2003.10 (Defense Procurement Circular 76-6, January 31, 1977), in which bidders were advised that evaluation of bids and the determination as to equality of the product offered would be based on "information furnished by the bidder or identified in his bid, as well as other information reasonably available to the procuring activity." Bidders were cautioned that the purchasing activity was not responsible for locating or securing such information and that, accordingly, they must furnish, as part of their bids,

"all descriptive material \* \* \* necessary for the purchasing activity 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."

Shortly after the October 14, 1982 bid opening, the low bidder was rejected as nonresponsive for failure to

meet a number of salient characteristics. MEMM, the second-low bidder at \$145,000, offered a system identified in its bid only by the manufacturer's name, MEMM General, Inc., and the words "Equal Product"; it did not include a model number or any descriptive literature. MEMM also bid \$1,500 for a line item covering contract data. Texstar Painting Contractors, the third low bidder at \$165,000, offered the brand name system, Texstar Model No. C6-BT, and did not price the data item separately.

On October 22, 1982, the record indicates, MEMM wrote the contracting officer, presenting information concerning the previous business experience of its president and vice president. In addition, the firm stated that it would like to meet with the Navy "to explore and resolve" several items related to the solicitation, including the motor used to drive the pump, the steam heat exchanger, a method of reclaiming and reusing detergent and acid, and a review of specifications for chemical cleaning systems under development by the Navy. The letter specifically stated that MEMM's president was:

"presently working under Navy contract to develop a cleaning system for ships' tanks and bilges. The system will be tested in November of this year and include many innovative approaches to the cleaning problem. MEMM General has incorporated many of these innovations in its unit that not only compares to but is more efficient, less costly, and safer than the Texstar unit presently in service. We are, of course, prepared to duplicate the existing configuration for the price quoted, should you so desire."

The requested meeting did not take place, however, until after the Navy awarded a contract to Texstar on February 14, 1983. MEMM's protest to our Office followed its February 22, 1983 debriefing, at which the Navy advised MEMM that its bid had been considered nonresponsive because it did not include drawings or documentation that would allow a technical evaluation.

MEMM's protest is based in part on the fact that the Navy took more than the 60-day bid acceptance period to make award. During the interim between bid opening and

award, MEMM states, whenever it attempted to determine the status of the procurement, it was repeatedly told that a technical evaluation was being performed. MEMM finds the Navy's position that it could not evaluate its offer inconsistent with this response.

The firm has a number of other objections: that its bid was \$18,500 less than Texstar's for a superior system that is being used to clean tanks and bilges on the U.S.S. Constellation at the Navy Shipyard in Puget Sound, Washington; that as the original designer, MEMM could duplicate the Texstar system at a lower price than the awardee, and that a letter included in the bid package specifically obligated MEMM to deliver at least a duplicate of the Texstar system; that the procuring activity refused to consider comments on the MEMM system from the Naval Civil Engineering Laboratory at Port Hueneme, California; that an award to MEMM would involve up to seven subcontractors, thus stimulating a more diversified business base than an award to Texstar; and that the solicitation specifically included drawings and documentation as line item 0002, to be provided at the time of delivery of the system, not before award.

We find, first, that the delay in award beyond the 60-day acceptance period does not provide a legal basis for challenging the award. While the Navy has not provided a plausible explanation of its failure to make an award within 60 days, it is generally within a contracting agency's discretion to request bidders to extend their acceptance periods when, due to administrative delays, this becomes necessary. Bidders are, of course, free to refuse such requests and withdraw their bids. See DAR § 2-404.1 (c); McGregor Printing Corporation, B-207284; B-207377, September 20, 1982, 82-2 CPD 240. However, since MEMM has presented no evidence to the contrary, we assume that both bidders here agreed to extend their bids.

Second, we find that the Navy properly rejected MEMM's bid because of lack of technical data. In a brand name or equal procurement, when the procuring activity specifies salient characteristics of the brand name product and requires descriptive data to show that they will be met, the responsiveness of an "equal" bid depends on the completeness of the information submitted or reasonably

available to the procuring activity. It is not enough that the bidder believes its product is equal to--or even better than--the brand name product, or makes a blanket statement that all salient characteristics will be met; rather, the bidder must demonstrate equivalency. Sutron Corporation, B-205082, January 29, 1982, 82-1 CPD 69, and cases cited therein.

If, in its bid, the bidder offering an "equal" product has indicated a specific model number, after opening it may make available to the Government information (1) that was in existence before opening and (2) that describes the model indicated and shows that it meets the salient characteristics of the brand name product. Such action does not affect the responsiveness of the bid. However, when there is a question as to the model offered, we have held that a bidder may not supply a model number or descriptive data after opening, because this would give it an opportunity to make a nonresponsive bid responsive. See Pure Air Filter International and Thermal Control, Inc., 56 Comp. Gen. 608 (1977), 77-1 CPD 342; Environmental Conditioners, Inc., B-188633, August 31, 1977, 77-2 CPD 166.

MEMM's bid provided absolutely no information that would have permitted the Navy to determine that its "equal" cleaning system would meet each of the salient characteristics of the Texstar system named in the solicitation. In the absence of a model number, descriptive data, or some indication that MEMM manufactured only a single, fully developed cleaning system for ship hatches and bilges, this is clearly a case in which the Navy would have been unable to determine what it was agreeing to purchase. Further, MEMM's letter to the Navy of October 22, 1982, in which it stated that the firm's president was "presently" working to develop a cleaning system that would be tested in November, raises doubts that the system offered was available at the time of bid opening.

Under these circumstances, MEMM's bid must be regarded as nonresponsive, and thus the procuring activity could not properly have considered comments of the Naval Civil Engineering Laboratory in evaluating it or met with MEMM to resolve questions or otherwise to establish its responsiveness after opening.

As for MEMM's arguments that its system is innovative, superior, and in line with Navy objectives to improve the chemical cleaning process, the Navy could not have evaluated any innovative features in determining the awardee, since these features were not specified in the invitation and there was no indication that evaluation credit would be given for innovation. Id. Nor could the alleged advantage to the Government that would be gained by MEMM's use of seven subcontractors have been considered, since bids or offers may not be properly evaluated on a basis that is not stated in a solicitation. See Piasecki Aircraft Corporation, B-190178, July 6, 1978, 78-2 CPD 10.

We see nothing on the face of MEMM's bid that indicates its willingness to provide the brand name product at \$145,000, and neither MEMM nor the Navy has provided us with any letter to this effect that was included in the bid package. In its comments on the agency report, MEMM has highlighted that portion of the brand name or equal clause which states that unless the bidder clearly indicates in its bid that it is offering an "equal" product, the bid shall be considered as offering the brand name product referenced in the invitation. MEMM's bid, however, indicated that it was offering its own, purportedly equal product. The only indication in the record of an alternate offer of the Texstar system is MEMM's October 22, 1982 letter to the Navy, which must be regarded as an unacceptable late modification of the bid. See DAR §§ 2-303; 7-2002.2.

Finally, it appears that MEMM has confused the solicitation requirement for contract data, which included maintenance manuals, "as built" drawings, and flow diagrams, with the requirement for descriptive data. While the first was covered by line item 0002 and must be delivered by the successful contractor, the second was required of all bidders of "equal" products in order to show that they met the salient characteristics of the brand name product.

In view of our conclusions, MEMM's bid price is not relevant, since it was not the low, responsive, responsible bidder.

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The protest is denied.

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