



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Physio Control Corporation
File: B-224491
Date: October 17, 1986

DIGEST

Protest that awardee's product was not equal to the brand name product specified in request for proposals is denied. The protester has failed to establish as unreasonable agency's acceptance of best and final offer to furnish the two salient requirements which agency determined were not offered in the awardee's descriptive literature submitted with its initial offer.

DECISION

Physio Control Corporation protests the Department of the Army's award of a contract to Medical Research Laboratories, Inc. (MRL) under request for proposals (RFP) No. DADA11-86-R-0020, which solicited, on a brand name or equal basis, a portable battery powered cardiac defibrillator/monitoring system. Physio Control asserts that the award to MRL is improper because MRL's descriptive literature submitted with its offer did not demonstrate that MRL's equipment was equal to the brand name product which is manufactured by the protester.

We deny the protest.

The RFP, issued on February 24, 1986, solicited seven "Defibrillator/Monitor System Battery Powered, portable, Physio Control Corp. Model Life Pak 6 . . . or equal." The RFP listed 26 salient characteristics of the brand name item, including the two requirements at issue here, that the "batteries shall be nickel-cadmium type," and that the defibrillator have 10 specified energy settings. The RFP also contained the brand name or equal clause which appears at section 52.210-7000 of the Department of Defense Supplement to the Federal Acquisition Regulation, 48 C.F.R. § 252.210-7000 (1984), which clause provides, in pertinent part that:

037115

". . . If the offeror proposes to furnish an 'equal' product, the brand name, if any, of the product to be furnished shall be inserted in the space provided in the solicitation, or such product shall be otherwise clearly identified in the proposal. The evaluation of proposals and the determination as to quality of the product offered shall be the responsibility of the Government and will be based on information furnished by the offeror or identified in his proposal, as well as other information reasonably available to the purchasing activity. CAUTION TO OFFERORS. The purchasing activity is not responsible for locating or securing any information which is not identified in the proposal and reasonably available to the purchasing activity. Accordingly, to insure that sufficient information is available, the offeror must furnish as a part of his proposal 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 salient characteristics requirements of the solicitation and (ii) establish exactly what the offeror 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 purchasing activity.

". . . If the offeror proposes to modify a product so as to make it conform to the requirements of the solicitation, he shall (i) include in his offer a clear description of such proposed modifications, and (ii) clearly mark any descriptive material to show the proposed modifications."

Seven firms submitted offers and the Army conducted technical evaluations of offers to determine whether the products proposed met the salient characteristics. Physio Control offered the brand name product; the other offerors, including MRL, offered an "equal" product. The Army conducted discussions with the offerors concerning the lack of certain salient features which rendered the products technically unacceptable. Specifically, the Army's technical evaluation of MRL's offer dated April 22, based on the descriptive literature submitted for MRL's product, indicated that MRL offered 8 energy settings, not the 10 energy settings required under the RFP, and offered lead acid batteries, not the nickel cadmium batteries required by the RFP. By letter

dated April 23, the Army advised MRL of these two deficiencies.

Best and Final Offers were to be submitted by May 30, 1986. Only Physio Control and MRL submitted best and final offers. The protester's offer was unchanged and its total price was \$42,476. In its best and final offer, MRL stated that the product offered would be powered by nickel cadmium batteries and have 10 energy settings as required by the RFP. MRL quoted a total price of \$37,800, the same price it initially offered. The contracting officer determined MRL's proposal to be technically acceptable based on its revised offer to correct the deficiencies. The contracting officer found that the modification of MRL's product to accommodate 10 energy settings and to provide nickel cadmium batteries did not constitute significant design changes to MRL's product. Under these circumstances, the contracting officer concluded the offer was acceptable without requiring further descriptive literature.

We note in this connection that the Army's primary user of the equipment argued that the Army should reopen negotiations and obtain a modified unit to test before making the award to MRL. However, the contracting officer declined to follow this recommendation. The contracting officer and his legal advisor concluded that there was no RFP requirement for testing prior to award, that MRL's best and final offer to meet the specifications was sufficient indication of MRL's intent to comply with the specification and that reopening discussions was not justified and would possibly generate a protest from MRL. Award was made to MRL as the lowest priced, technically acceptable offeror.

The thrust of Physio Control's protest is that MRL was required to submit descriptive literature with its best and final offer to establish its equality with the brand name with regard to the batteries and energy settings and that the agency could not accept MRL's statement offering to provide the two salient features. Physio Control asserts that MRL's failure to include descriptive literature to show its product's compliance with these two salient features rendered its offer nonresponsive and that the Army should have rejected MRL's offer.

We conclude that the Army properly accepted MRL's offer and deny the protest.

As the agency points out, this procurement was conducted as a negotiated procurement and the concept of responsiveness generally does not apply to negotiated procurements as it

applies in sealed bid procurements. See Xtek Inc., B-213166, Mar. 5, 1984, 84-1 C.P.D. ¶ 264. However, certain solicitation requirements may be sufficiently material such that a proposal which fails to include them is technically unacceptable. True Machine Co., B-215885, Jan. 4, 1985, 85-1 C.P.D. ¶ 18.

Under the RFP brand name or equal provision, the procuring agency is responsible for evaluating the data supplied by an offeror and ascertaining if it provides sufficient information to determine the acceptability of the offeror's item. We will not disturb this technical determination by the agency unless it is shown to be unreasonable. Panasonic Industrial Co., B-207852.2, Apr. 12, 1983, 83-1 C.P.D. ¶ 379.

We cannot conclude here that the contracting officer's determination of technical acceptability was unreasonable. In its best and final offer MRL indicated it would furnish the nickel cadmium batteries and the two additional energy settings, which were the only two deficiencies found in its initial offer. The contracting officer concluded that the revised offer resolved the deficiencies identified in the technical evaluation, that the modifications to the product involved minor design changes and that the offer was technically acceptable. With regard to the batteries, the record indicates that the descriptive literature MRL submitted with its initial offer shows the nickel cadmium batteries as an accessory available as an option. Therefore, in its best and final offer, MRL, in effect, verified that it would furnish a preexisting optional feature of its equipment. Regarding the 10 energy level settings which the contracting officer also considered to require minor design changes, MRL maintains in a letter contained in the agency report, which Physio Control does not dispute, that it has the capability to provide 10 settings, but does not normally offer them because eight settings meet medical association standards. MRL further states the modification requires a change of "4 (four) resistors, a similar switch with 10 instead of 8 energy positions and a different decal."

Physio Control does not challenge the contracting officer's finding that the product revisions involved minor design changes, or even express disagreement with the contracting officer's finding that MRL can provide an acceptable product. In fact, there is no indication that MRL's product will not comply with all salient requirements. The protester instead argues that the contracting officer could not accept MRL's best and final statements of compliance as sufficient evidence of technical acceptability without obtaining detailed descriptive material to support the statement. We

find nothing in the solicitation that required rejection of the offer in these circumstances. See Panasonic Industrial Co., B-207852.2, supra, in which we denied a similar protest that an awardee's product was not equal to the brand name product specified in the RFP where the protester could not establish as unreasonable the agency's acceptance, during discussions, of the awardee's statement that its product complied with the questioned salient characteristics.

We recognize that the solicitation requires an offeror proposing to modify its product to clearly mark any descriptive material to show the proposed modifications. We view the awardee's best and final offer which showed the awardee's intent to modify its product as effectively satisfying this requirement.

We deny the protest.

for Seymour E. Fros
Harry R. Van Cleve
General Counsel