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**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Tri Tool, Inc.
File: B-233153
Date: January 25, 1989

DIGEST

1. Agency properly rejected protester's bids submitted in response to a brand name or equal solicitation where the protester failed to submit sufficient information with the primary bid to demonstrate that the product offered complied with the specifications, and the product offered by the alternate bid was clearly noncompliant with the specifications.
2. Protest that specifications are defective is untimely and will not be considered on the merits where it was filed with the General Accounting Office more than 10 working days after the agency took adverse action on the protester's agency-level protest.

DECISION

Tri Tool, Inc. protests the rejection as nonresponsive of two bids it submitted in response to invitation for bids (IFB) No. 13-SSC-B-88-21, issued by the National Aeronautics and Space Administration (NASA) for a portable pipe cutting machine system.

We deny the protest in part and dismiss it in part.

The IFB was issued on July 14, 1988, on a brand name or equal basis for a portable pipe cutting machine system. Bids were due on September 8. Exhibit A to the IFB detailed five pages of salient characteristics that an offered item was required to meet. The IFB advised offerors that the equality of an offered item would be judged from information furnished by the offeror and information reasonably available to the contracting agency. The IFB also cautioned bidders to furnish all descriptive material necessary for the contracting officer to determine if the offered product meets the salient characteristics and to establish exactly what the offeror proposes to furnish and what the government

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would be obligating itself to purchase by making an award. If the bidder offered to modify one of its products to conform to the requirements of the IFB, the bidder was advised to include a clear description of the proposed modifications and to clearly mark any descriptive material to show the proposed modifications.

NASA received nine bids in response to the IFB. Tri Tool submitted two "or equal" bids, a primary bid in which Tri Tool offered to modify its standard equipment, and an alternate bid in which it offered its standard equipment. Tri Tool's bids were the lowest NASA received. In reviewing the bids, however, NASA found that Tri Tool had not demonstrated that the items it offered met the salient characteristics in the IFB. Consequently, by letter dated September 29, NASA notified Tri Tool that its bids were rejected.

On October 11, Tri Tool protested to our Office that its bids were improperly rejected and as the low, responsive, responsible bidder, it was entitled to the contract award. On December 12, in its comments on NASA's report on the protest, Tri Tool further complained that NASA failed to provide Tri Tool with a copy of the technical evaluation of its bid and that our Office refused to release the report in response to Tri Tool's request.

NASA responds that the information Tri Tool submitted with its primary bid did not demonstrate that the modified product Tri Tool offered met the specifications. Specifically, NASA could not tell from the information submitted whether the offered item met the requirements for: (1) an out-of-round tracking module; (2) adjustable in feed rate capability from 0 to .006 inches per revolution; (3) cam activated feed modules; and (4) a cutting system that did not require any orientation during startup, stopping or restarting. Concerning Tri Tool's alternate bid, NASA found that the standard product offered by Tri Tool did not, as required by the specifications, offer: (1) adjustable in feed rate capability from 0 to .006 inches per revolution; (2) a camfeed activation system; (3) an out-of-round tracking module with a spring-loaded tool slider or similar mechanism; and (4) carbide bits. NASA therefore concluded that it properly rejected Tri Tool's bids.

To be responsive to a brand name or equal solicitation, bids offering equal products must conform to the salient characteristics of the brand named equipment listed in the solicitation. A bidder must submit with its bid sufficient descriptive literature to permit the contracting agency to assess whether the equal product meets all the salient

characteristics specified in the solicitation. If the solicitation or other information available to the contracting activity does not show compliance with the solicitation requirements, the bid must be rejected. Moreover, blanket statements of compliance or the bidder's belief that its product is functionally equal to the brand name product are not enough; rather, the protester must affirmatively demonstrate the equivalency. AZTEK, Inc., B-229897, Mar. 25, 1988, 88-1 CPD ¶ 308.

Here, although in its report on the protest NASA discussed in detail the evaluation of Tri Tools bids, Tri Tool does not argue that the products it offered met the requirements of the IFB. Rather, Tri Tool asserts that NASA never responded to Tri Tool's prior complaints about the propriety of the specifications with which Tri Tool's bids were found noncompliant. Thus, Tri Tool argues that in a letter dated July 27, Tri Tool protested to NASA that certain specifications contained in the IFB--including the requirements for a camfeed system, an adjustable feed rate capability of 0 to .006 inches per revolution, and automatic compensation for out-of-round pipe--were either restrictive of competition or overstated NASA's needs. Tri Tool also submitted a protest with its bid asserting that the required tool bits were not adequately described. These arguments, however, do not demonstrate that Tri Tool's equipment met the IFB specifications.

Moreover, our review of the bids submitted by Tri Tool supports NASA's findings that the information supplied by Tri Tool with its primary bid does not demonstrate that the product Tri Tool offered will meet the salient characteristics of the IFB, and that the information in Tri Tool's alternate bid clearly demonstrates that the standard item Tri Tool offered does not meet the requirements of the IFB. In view of Tri Tool's failure to rebut NASA's findings, we conclude that NASA properly rejected Tri Tools bids as nonresponsive.

With regard to the evaluation of its bids, Tri Tool maintains that NASA improperly failed to provide it with the technical evaluation of its proposal and that our Office refused to release the evaluation documents in response to Tri Tool's request that we do so.

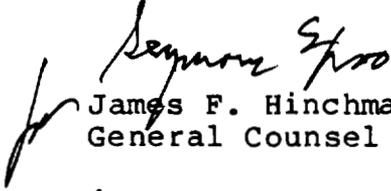
The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(b)(2) (Supp. IV 1986), requires the contracting agency to submit to the Comptroller General a complete report, including all relevant documents, on a protested procurement. CICA also requires contracting agencies to provide to the protester and any other interested party, any

document relevant to a protested procurement action, including the required administrative report, that would not give that party a competitive advantage and that the party is otherwise authorized by law to receive. Pursuant to CICA, our regulations provide that we will review whether documents withheld by an agency should be released to the protester. 4 C.F.R. § 21.3(f) (1988). Here, NASA withheld the documents containing its evaluator's comments; however, the contracting officer's report and the cover sheet to the protest report, both of which were provided to Tri Tool, fully detailed all the information in the evaluation documents. Under these circumstances, we decided that release of those two documents satisfied the requirements of CICA.

Finally, to the extent that Tri Tool in its comments on the agency's report challenges the propriety of the specifications, those contentions are untimely. Under our Bid Protest Regulations, protests based upon improprieties in a solicitation that are apparent prior to bid opening must be filed with the procuring agency or our Office prior to that time. 4 C.F.R. § 21.2(a)(1). Our Office will consider a protest that was first submitted to the procuring agency if it is filed here within 10 working days after the protester receives formal notice or has actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a)(3).

With respect to Tri Tool's July 27 protest concerning the adequacy of certain specifications, NASA's receipt of bids on September 8, the scheduled bid opening date, without taking any corrective action in response to the protest constituted adverse agency action and started the running of the 10-day period. Southwest Marine of San Francisco, Inc.--Request for Reconsideration, B-229654.2, Jan. 19, 1988, 88-1 CPD ¶ 49. Since Tri Tool did not raise these issues with our Office until December 12, when it submitted its reply to NASA's report, they are clearly untimely and will not be considered on the merits. Moreover, Tri Tool's other protest concerning the adequacy of the specifications for tool bits was itself untimely since it was submitted with its bid instead of prior to the time set for bid opening. Fluid Systems, Inc., B-225880, Jan. 6, 1987, 87-1 CPD ¶ 20.

The protest is denied in part and dismissed part.


James F. Hinchman
General Counsel