



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Pauli & Griffin

File: B-234191

Date: May 17, 1989

DIGEST

1. Protest that agency did not notify protester of its elimination from competition until after award is denied since agency notification is a procedural matter not affecting the validity of award.
2. Discussions are meaningful where the agency imparted sufficient information to protester, through an amendment to the solicitation, to afford it a fair and reasonable opportunity, in the context of the procurement, to identify and correct the deficiencies in its proposal.
3. In brand name or equal procurement, agency decision to reject protester's offer of an equal product is proper where the best and final offer listed the salient characteristics as features, but failed to clearly describe the proposed modifications of the standard model. Protester's failure to set forth the modifications would not allow the contracting agency to determine whether the product in fact complied with the stated salient characteristics.
4. Clarification of offeror's prices and acceptance of late modification offering more advantageous terms to government do not constitute discussions with the offeror.

DECISION

Pauli & Griffin (P&G) protests the award of a contract to LTC International, Incorporated, for the supply of vacuum blasting systems for use in rehabilitating missile silos under request for proposals (RFP) No. F42650-88-R-0374 issued by Ogden Air Logistics Center, Hill Air Force Base, Utah. Vacuum blasters use compressed air to spray media (e.g., small plastic or metal pellets) onto painted surfaces and immediately vacuum the media and removed paint back into the machine where the debris is separated from reusable

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media. P&G contends that the Air Force did not conduct meaningful discussions with it and improperly rejected its offer as technically unacceptable.

We deny the protest.

The RFP was issued on August 19, 1988, on a brand name or equal basis with the LTC 1060 model specified as the brand name product. The RFP listed 10 salient characteristics, five of which are most relevant to this protest:

- (1) Blasts effectively and pulls 99% of media and debris 100' vertically back into machine.
- (2) Minimum removal rate for three coats, eight mils paint of 72 sq. ft./hr.
- (3) Overall dimensions not to exceed 26" wide, 51" long, 69" high.
- (4) Empty weight not to exceed 800 lbs.
- (5) Compressed air requirement of no more than 100 PSI [pounds per square inch]/250 CFM [cubic feet per minute].

Offerors were specifically advised that all proposals to furnish "equal" equipment were to provide descriptive literature to allow determination of the equipment's acceptability.

The RFP incorporated by reference the provision at Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.210-7000 (1988 ed.), which requires offerors to furnish all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the contracting activity to determine whether the product offered meets the salient characteristics of the RFP and establish exactly what the offeror proposes to furnish. In addition, the provision states:

"If the offeror proposes to modify a product so as to make it conform to the requirements of the [solicitation], the offeror shall (i) include in the proposal a clear description of such proposed modifications, and (ii) clearly mark any descriptive material to show the proposed modifications."
DFARS § 252.210-7000(c)(2).

Initial offers were received from LTC, P&G, and another offeror by the closing date of September 9. P&G's offer included descriptive literature for its standard PRAM 43 model and a statement that "no exceptions to specification" were taken. Among other features listed for the PRAM 43 were its 100 CFM vacuum pump; its air requirement of 81 CFM at 100 PSI; and its dimensions, 38" long x 30" wide x 68" high. A PRAM 43 operation manual provided for an optional hose which would extend the system's range to 75 feet.

The Air Force could not tell from P&G's descriptive literature whether its product met all the salient characteristics. In discussions with P&G, the Air Force provided it with the information contained in amendment 0001 to the RFP and requested a best and final offer (BAFO). Amendment 0001 reiterated the five salient characteristics listed above and advised offerors that the "[b]rochure provided must specifically show that machines are capable of meeting salient characteristics." All offerors submitted BAFOs.

In its BAFO, P&G protested the requirement that its brochure specifically show that its product met the salient characteristics and the inclusion of exact dimensions as salient characteristics. It noted that it had furnished unspecified machines of this type to the government and had provided 23 "similar machines" in a prior contract with Hill Air Force Base. P&G urged that its "successful performance on these previous efforts should serve as evidence of our ability to perform."

Notwithstanding its protests, P&G stated that it was prepared to manufacture its machine to meet the dimensional requirements and enclosed a revised brochure indicating its proposed machine. In revising this brochure, P&G renamed it^{1/} and added a "features" list which restated the salient characteristics listed in the RFP. In addition, P&G amended the brochure's specifications list to indicate the required dimensions and to change the media and vacuum hose lengths from 20 feet to 100 feet. No changes were indicated with regard to air consumption or the vacuum pump.

^{1/} The original brochure, which denominated the PRAM 43 as an "Aircraft Dry Stripping Facility," was changed to denominate the machine as a "Closed System Abrasive Blast Machine."

As part of the evaluation, another firm under contract to the Air Force reviewed^{2/} P&G's BAFO and first noted that technicians at the using facility would not use the P&G machines the Air Force already possessed because they were "extremely slow." The reviewer disputed P&G's statement of features, opining that a machine requiring only 81 CFM of air at 100 PSI "surely cannot meet" the requirement that the machine pull 99 percent of the media and debris 100 feet vertically back into the machine and "probably" could not meet the minimal removal rate. The reviewer also noted that according to P&G's PRAM 43 operation manual, its range, as indicated by the optional hose assembly, was only 75 feet and not the 100 feet promised.

The evaluation review concluded that P&G's machine would not meet the salient characteristics concerning the 99 percent/100 feet vacuum capacity or the minimal removal rate. The review explained that the 23 machines supplied by P&G to Hill Air Force Base were PRAM 45 machines which were larger and had more capacity than the PRAM 43 machines proposed under this RFP, and that these "PRAM 45" machines were too slow and would not vacuum the media from 30 to 100 feet inside missile silos up to ground level.^{3/} Thus, P&G's proposal was found unacceptable.

On December 9, 1988, P&G withdrew its protests regarding the brochure and dimension requirements. On December 13, award was made to LTC and P&G was notified by letter of the same date that its proposal was technically unacceptable. P&G then filed a protest with the agency wherein it explained that the "PRAM 45" units already in use were actually less powerful utility models. It also explained that its proposed machine was a model 43 unit modified to meet the required specifications including being "equipped with a larger PRAM 45 type vacuum inducer."

^{2/} The Air Force claims in its report that it never received this BAFO or reviewed it. Based on the comments of the reviewing contractor, however, it is plain that it was received and considered.

^{3/} Although the original supply contract called for PRAM 45 machines, the record reflects that the contract as modified required a much less powerful, utility model ostensibly designed only to operate using a hose assembly 20 feet in length.

On January 17, 1989, P&G first learned of the contract award and that the agency intended to deny its protest on the basis of a failure of P&G to establish compliance with the salient characteristics. P&G then filed its protest with our Office.

As a preliminary matter, P&G contends that the Air Force erred by failing to synopsize the procurement in the Commerce Business Daily (CBD). The Air Force responds that it was not required to synopsize this procurement because it was a limited competition conducted under proper statutory authority: 10 U.S.C. § 2304(c)(2) (Supp. IV 1986), as implemented by Federal Acquisition Regulation (FAR) § 6.302-2 (FAC 84-38), which permit a noncompetitive award for reasons of unusual and compelling urgency. Procurements conducted under this authority are exempted from the publication requirement. FAR § 5.202(a)(2). However, since P&G was aware of the RFP and submitted a timely offer, P&G was not prejudiced even assuming the Air Force's justification for nonpublication was not adequate. See Gott Corp., B-222586, B-223260, Aug. 5, 1986, 86-2 CPD ¶ 154.

P&G also contends that the Air Force violated applicable regulations by failing to notify it of its elimination from the competition until after award was made to LTC. However, while it appears the agency did not promptly advise P&G of the award, this does not provide a basis to sustain the protest. The failure to notify a firm promptly that it is no longer in consideration for award and the failure to notify it of award to another firm are merely procedural in nature and do not affect the validity of an otherwise properly awarded contract. See Space Communications Co., B-223326.2, B-223326.3, Oct. 2, 1986, 86-2 CPD ¶ 377; L.L. Rowe Co., B-220973, Feb. 27, 1986, 86-1 CPD ¶ 204.

On the merits, P&G contends that the Air Force did not conduct meaningful discussions with it. In P&G's view, the Air Force should have allowed P&G to clarify its proposal with regard to the previously furnished "similar machines."

In evaluating whether there has been sufficient disclosure of deficiencies in discussions, the focus is not on whether the agency described the deficiencies in such intimate detail that there could be no doubt as to their identification and nature, but whether the agency imparted sufficient information to the offeror to afford it a fair and reasonable opportunity, in the context of the procurement, to identify and correct the deficiencies in its proposal. See Eagan McAllister Assocs., Inc., B-231983, Oct. 28, 1988, 88-2 CPD ¶ 405. There is no requirement that agencies conduct all-encompassing discussions; rather, agencies are

only required to reasonably lead offerors into those areas of their proposals needing amplification given the context of the procurement. Northwest Regional Educational Laboratory, B-222591.3, Jan. 21, 1987, 87-1 CPD ¶ 74.

P&G's initial proposal was reasonably read as offering an unmodified PRAM 43. It thus failed to establish that it could meet the vacuum, retention, and removal requirements of the RFP. In order to bring P&G's deficiencies to its attention, the Air Force issued an amendment apprising P&G of the requirement that descriptive literature be furnished to "specifically show" that it met five of the original 10 salient characteristics.

We have recognized that simply amending an RFP does not necessarily constitute meaningful discussions. See OAo Corp., B-228599.2, July 13, 1988, 88-2 CPD ¶ 42; Avitech, Inc., B-223203.2, Mar. 27, 1987, 87-1 CPD ¶ 351. However, P&G responded to this amendment by revising its descriptive literature in an attempt to show compliance with these characteristics. See SelectTech Services Corp., B-229851, Apr. 18, 1988, 88-1 CPD ¶ 375. Thus, this amendment apparently did lead P&G into the areas of its proposal needing amplification.

P&G next contends that the Air Force was unreasonable when it rejected P&G's proposal as technically unacceptable, since its BAFO detailed all the salient characteristics of the brand name as features of the PRAM 43 and P&G expressly took no exceptions to the specifications. The Air Force rejected P&G's offer because it found that the PRAM 43 machine which P&G proposed was not powerful enough to meet the 100 foot vacuum and blasting performance characteristics of the brand name item.^{4/}

In brand name or equal procurements, the procuring agency is responsible for evaluating the data submitted by the offeror and ascertaining if it provides sufficient information to determine the acceptability of the offeror's products as equal to the brand name products. Physio Control Corp., B-224491, Oct. 17, 1986, 86-2 CPD ¶ 467. Further, in

^{4/} The Air Force assessment was flawed (1) because it erroneously assumed that the machines proposed by P&G were less powerful than those delivered under a prior contract and (2) because the Air Force erroneously concluded that P&G's BAFO did not offer additional descriptive literature, even though, as indicated above, the record clearly shows this literature was received and considered by an Air Force contractor.

reviewing a procurement action we look to see if it is supportable, not whether it was properly supported at the time it was taken. Bank Street College of Education, 63 Comp. Gen. 393 (1984), 84-1 CPD ¶ 607.

Here, although as indicated in footnote 4, supra, the Air Force's evaluation was flawed, we find the rejection of P&G's proposal was proper. The RFP required "or equal" offerors who intended to modify their products to conform to the salient characteristics to provide a "clear description" of proposed modifications and to "clearly mark" descriptive literature to show the modifications. DFARS § 252.210-7000(c)(2). P&G did neither. In its original proposal, P&G offered a standard model and stated it was taking no exceptions to the specifications. In its BAFO, it revised its standard brochure to indicate the salient characteristics of the brand name as "features." Although it states in its agency-level protest that it intended to substitute a more powerful PRAM 45 vacuum inducer in the proposed machine, this was not indicated in the original proposal or BAFO. According to P&G's literature, the PRAM 45 has an air consumption rate of 340 CFM at 100 PSI. However, P&G's BAFO does not reflect any increase in air consumption over the standard PRAM 43 unit. Thus the proposed modification was not even implied in the BAFO. The failure to show this modification is significant in view of the aforementioned assessment of the Air Force contractor who reviewed P&G's BAFO that the 81 CFM air consumption of the machine proposed by P&G was not sufficient to show that the machine would be powerful enough to meet the vacuum or blasting requirements of the RFP.

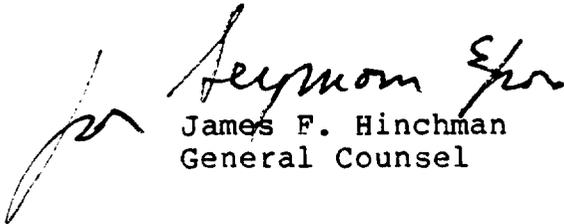
A protester has the burden of affirmatively proving the equality of its product by submitting sufficient information to establish that its product is either identical or equal to the brand name product. See Dantronics, Inc., B-222307, June 30, 1986, 86-2 CPD ¶ 17. Neither blanket statements of full compliance nor repeating the salient characteristics are sufficient to meet that burden. AZTEK, Inc., B-228376, Feb. 5, 1988, 88-1 CPD ¶ 113. Accordingly, we find that P&G's statement of "no exceptions" with a restatement of the salient characteristics as "features," without a clear description or indication of modifications, were insufficient to establish the equality of its product.

P&G also alleges that the Air Force conducted post-BAFO discussions with LTC. During the evaluation period, the contract specialist noticed that LTC's unit prices were inconsistent with its aggregate prices. LTC explained these discrepancies by demonstrating that one was due to a rounding off of \$.5270 to \$.53 in one unit price and the

other was due to a transposition of numbers. LTC also sought to substitute superior quality attachments for those offered in its proposal, at no additional cost, and the agency approved the substitutions.

However, it is apparent that seeking and obtaining the explanation of inconsistencies in LTC's unit price did not constitute discussions since this communication did not afford LTC an opportunity to revise or modify its proposal, nor was it information essential for determining the acceptability of a proposal. RCA Service Co., B-219643, supra. Moreover, accepting LTC's offer of substituted parts also did not constitute discussions. FAR § 52.215-10(f) (FAC 84-17) provides that a late modification of an otherwise successful proposal making its terms more favorable to the government may be considered and accepted at any time it is received. Since LTC was offering better quality parts at no cost increase, its offer was properly accepted.

Accordingly, the protest is denied.



James F. Hinchman
General Counsel