

A. Shimamura



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: J.E. Pope Company, Inc.

File: B-238560

Date: May 16, 1990

J. Earl Pope, for the protester.
Guy N. Graham, for Business Systems of South Carolina, an interested party.
Douglas P. Larsen, Jr., Esq., Office of the General Counsel, Department of the Navy, for the agency.
Amy M. Shimamura, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee's high-density movable shelving system fails to meet certain characteristics of brand name product in a "brand name or equal" procurement is denied where the protested characteristics were not included in the specifications and contracting agency determined that the awardee's product was equal to the brand name product.
2. Where contracting agency is not a mandatory user of General Services Administration Federal Supply Schedules, the agency may properly purchase items on the "open market" when the contracting agency determines that it would be in the government's best interest in terms of quality, responsiveness, or costs.

DECISION

J.E. Pope Company, Inc., protests the proposed issuance of purchase order No. N00612-90-M-1359 to Business Systems of South Carolina under an oral request for quotations (RFQ) issued by the Naval Supply Center (NSC), Department of the Navy, Charleston, South Carolina, for the purchase of a high-density movable shelving system on a "brand name or equal" basis. The shelving system is required by the Explosive Ordnance Disposal Mobile Unit Six (EODMU-SIX or Unit) for the storage of equipment repair parts. Pope contends that Business Systems' shelving does not include seven of the brand name item's required characteristics; that since the specifications were relaxed for the awardee,

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Pope should now be allowed to quote a price based on the relaxed specifications; and that because the required item is on a General Services Administration (GSA) Federal Supply Schedule (FSS), the agency was required to purchase the item off the FSS without competition.^{1/}

We deny the protest.

According to the agency, prior to issuance of the oral RFQ, a Pope representative visited EODMU-SIX and persuaded the unit's supply officer that its product, Spacesaver, would satisfy the unit's shelving needs. The mechanically-assisted Spacesaver shelving system, model S/3-MA, was selected. On January 3, 1990, requisitions were submitted by the supply officer to the NSC regional contracting department for the purchase of the shelving.

The requisitions specified the purchase of a Spacesaver system--consisting of Spacesaver brand floor, track, carriage, and platform; Burroughs shelving parts; and Rousseau modular drawers--and suggested Pope as the source. An attached equipment list, which was prepared by Pope, included the number and dimensions of the Spacesaver, Burroughs and Rousseau parts, but did not otherwise include any descriptive details or other characteristics of the shelving system.

Since the estimated price of the purchase was less than \$25,000, the procurement was conducted by NSC under small business-small purchase set-aside procedures pursuant to Federal Acquisition Regulation (FAR) § 13.105. Although the requisition recommended Pope as the source, in order to broaden competition, the contracting officer requested oral quotations from Business Systems and another source on a "brand name or equal" basis. The equipment list that was submitted with the requisition served as the specifications for the procurement.

Both of the solicited sources submitted quotations for "equal" shelving systems. Business Systems quoted prices for Kompakt floor, track, carriages, platform, mat and trim; Kardex shelving; and Rousseau modular drawers.

^{1/} Multiple Award Federal Supply Schedule, Miscellaneous Furniture, Steel Vertical Blueprint Filing Cabinets, Roll Drawing Files and High Density Movable Shelf Filing Systems, FSC Group 71, part III, section J, FSC Class 7125, for the period July 1, 1988, through June 30, 1991.

Based upon a determination that Business Systems' shelving met the specifications at the lowest cost, the contracting officer orally ordered the equipment from Business Systems on January 30. Since this protest was filed on February 9, prior to issuance of a confirmatory written purchase order, no written purchase order was ever issued to Business Systems, and delivery has been stayed pending the outcome of this protest.

Pope contends that Business Systems' shelving system should have been rejected because it does not have the following characteristics of the Spacesaver system:

- (1) One-piece, cold drawn structural "T" rail with all track joints tongue and groove;
- (2) Leveling screw adjustability on all rails;
- (3) Nonshrinking grout 8,000 PSI;
- (4) Aluminum carriages capable of supporting a minimum load of 1,000 pounds per carriage length foot;
- (5) Five-inch balanced and hardened steel wheels;
- (6) Wheels with single-flanged center guides; and
- (7) Effort required to move carriages: 1 to 3,000 pounds or 4.6 turns per 36 inches.

The protester contends that since it based its quotation on specifications, agreed to by EODMU-SIX and its firm, which require these seven characteristics, and the Navy has improperly allowed its competitors to submit quotations based on specifications which did not include the seven characteristics, it should now be permitted to submit another quotation based on the relaxed specifications. Pope maintains that it would provide a quotation for another Spacesaver system, model S/2-MA, which meets the relaxed specifications, and would result in a cost savings to the government. Further, the protester contends that since shelving systems are available under a GSA FSS contract, the agency should not have competed the requirement.

The Navy states that the seven characteristics which Pope claims Business Systems' shelving system lacks were not included in the RFQ's specifications. Rather, the Navy states that the equipment list which served as the solicitation's specifications only describes the quantity and size

of the various components of the high-density shelving system; no other design features were specified. Further, the Navy states that Business Systems' shelving system complies with the specifications in all material respects. Finally, the agency states that since the Department of Defense (DOD) is not a mandatory user of the FSS applicable here, the Navy was not required to purchase the shelving off the FSS.

In a brand name or equal procurement, a product offered as an equal need not meet unstated features of the brand name product, and where an agency does not include a list of salient characteristics in the solicitation, it may not reject an "equal" bid for noncompliance with a specific performance or design feature unless the offered item is significantly different from the brand name product. Industrial Storage Equip.-Pacific, B-228123, Dec. 4, 1987, 87-2 CPD ¶ 551, aff'd, B-228123.2, Apr. 1, 1988, 88-1 CPD ¶ 328.

Here, the protester contends that the agency improperly allowed Business Systems to provide a quotation based on relaxed specifications for the floor, track, carriages, and platform because the product it offered does not have certain features of the brand name system.^{2/} However, the record indicates that the seven characteristics of the Spacesaver system cited by the protester clearly are not included on the list that was prepared by the protester and used by the agency as the specifications for the Spacesaver portion of the procurement. Moreover, based on a review of descriptive literature that was submitted by the awardee and by Pope, the Navy has determined that Business Systems' offered product will meet its needs and is "equal" to the equipment offered by the protester. With regard to the differences between the offered systems, the Navy states that they are insignificant and that in some ways the awardee's system is better than the Spacesaver equipment.

In view of the fact that the specifications did not include the characteristics of the Spacesaver system which the protester alleges had to be provided, and the Navy's determination that the awardee's shelving system meets the specifications' requirements and the agency's needs, we have

^{2/} With regard to the other two major components of the shelving system, the awardee offered the same brand drawers as used in the Spacesaver system, and Kardex shelving instead of the brand name Burroughs shelving. Pope's protest, however, concerns only the floor, track, carriages, and platform offered by the awardee.

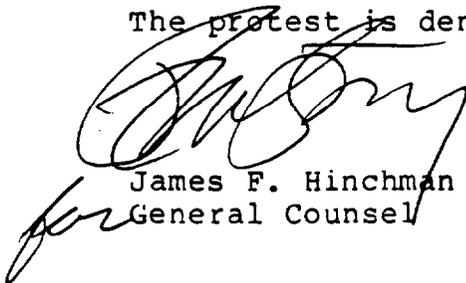
no basis upon which to question the Navy's determination that Business Systems' offered shelving system is "equal" to the brand name product. Further, since Pope itself prepared the equipment list that was used by the agency as the specifications, it clearly was aware of the basis on which quotes were solicited and cannot now complain that the Navy relaxed the specifications by not requiring products offered as "equal" to have all the design features of the Spacesaver system.

Pope also contends that the Navy was required by FAR § 8.404 to purchase the shelving from contractors listed on the FSS, and should not have sought quotations from other sources.

Where there is a mandatory FSS contract in effect, agencies designated as mandatory users are required to purchase their requirements from the schedule if their minimum needs will be met by items listed on the schedule. See Insinger Mach. Co., B-235320, Aug. 3, 1989, 89-2 CPD ¶ 104. Here, however, section 6 of the FSS states that DOD, and therefore the Navy, is not a mandatory user of the schedule. Moreover, all contracts issued under the FSS state that although DOD must consider use of FSS sources, DOD contracting officers may use other procedures to obtain items from nonschedule sources if, in the contracting officer's judgment, it would be in the government's best interest in terms of quality, responsiveness or costs. See Herman Miller, Inc., B-237866, Mar. 19, 1990, 69 Comp. Gen. ____, 90-1 CPD ¶ 307.

In this case, the Navy states that it sought to maximize competition in order to obtain a lower price. In doing so, the agency did, in fact, obtain an "equal" product at a lower price. In these circumstances, because the Navy is not a mandatory user of the FSS, it had the discretion to seek other sources for the shelving since it was in the government's best interest to obtain the item at a lower cost.

The protest is denied.



James F. Hinchman
General Counsel