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Comptroller General
of the United States
Washington, D.C. 20548

251139

Decision

Matter of: Barnard & Associates
File: B-253367
Date: September 13, 1993

Carole A. Barnard and William C. Stephens for the protester.
William E. Thomas, Jr., Esq., Department of Veterans
Affairs, for the agency.
Jacqueline Maeder, Esq., and Linda C. Glass, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Agency properly rejected bid received in response to brand name or equal solicitation as nonresponsive where item offered did not conform to listed salient characteristics.
2. Protest that attributes listed as salient characteristics are not significant features of the item to be acquired is dismissed as untimely where not filed prior to bid opening.

DECISION

Barnard & Associates protests the rejection of its bid as nonresponsive and the award of a contract to American Sterilizer Company (AMSCO) under invitation for bids (IFB) No. 665-9-93, issued by the Department of Veterans Affairs (VA) for equipment management systems.¹ The agency rejected Barnard's bid as nonresponsive because the protester failed to demonstrate that the "equal" item that it offered complied with the salient characteristics of the brand name item enumerated in the IFB.

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

¹An equipment management system is a surgical orbiter used in an operating suite to control the oxygen, nitrogen and nitrous oxide supply and provide vacuum outlets during surgical procedures. Here, the VA solicited a ceiling-mounted orbiter equipped with a motorized arm and an equipment platform/shelf.

The IFB, issued on December 18, 1992, on a brand name or equal basis, solicited bids for six equipment management systems, AMSCO Orbiter Model 705M or equal, and listed the salient characteristics that any equal item offered would be required to possess. These listed salient characteristics required, among other things, that the medical gas column be motorized and adjustable for height, have a horizontal range of at least 60 inches and a vertical range of at least 24 inches, be able to accommodate data communication lines, and have an optional depth-adjustable equipment platform to hold monitoring equipment and compressed brakes for precision positioning. Additionally, all controls, gas and electrical outlets were to be on the main column.

The solicitation contained the standard text of the Federal Acquisition Regulation (FAR) descriptive literature clause, FAR § 52.214-21, which defines descriptive literature and requires that any bidder offering an "equal" product must furnish with its bid all descriptive literature necessary to permit the agency to determine if the product offered meets the salient characteristics listed in the IFB. Bidders were advised that failure of the descriptive literature to show that the product offered conformed to the IFB's requirements would result in rejection of the bid.

Three bidders, including Barnard and AMSCO, responded to the solicitation. Barnard offered Medical Technologies, Inc. model 22-M, while AMSCO offered the brand name model.² The contracting officer determined that Barnard's bid, although lower in price, was nonresponsive, and on April 30, 1993, awarded a contract to AMSCO.

The agency reviewed the descriptive literature accompanying the protester's bid and found six areas in which the product the protester offered failed to conform to the salient characteristics of the brand name item. First, the agency concluded that descriptive literature submitted by the protester showed that the offered model had controls and gas outlets on the shelf, rather than on the column as specified. Second, the proposed column was not an adjustable height column, as required by the IFB. Additionally, the model proposed by Barnard had a horizontal range of only 56 inches; the IFB specified a horizontal range of 60 inches. The proposed column did not have the required vertical range of 24 inches and could not accommodate an optional depth-adjustable equipment platform. Finally, the agency found that the model proposed by Barnard did not have compressed brakes.

²Barnard is the representative for Medical Technologies, Inc., the original equipment manufacturer.

While Barnard concedes that its equipment management system does not conform to some of the listed salient characteristics, Barnard maintains that its product satisfies the VA's minimum needs and, because of its lower cost, it should have been awarded the contract.

To be responsive to a brand name or equal solicitation, a bid offering an allegedly equal product must conform to the salient characteristics of the brand name equipment listed in the solicitation. Trail Equip. Co., B-241004.2, Feb. 1, 1991, 91-1 CPD ¶ 102. If the literature submitted with the bid, and any other information available to the contracting agency, does not show compliance with the solicitation's salient characteristics, the bid must be rejected. Aztek, Inc., B-229897, Mar. 25, 1988, 88-1 CPD ¶ 308.

We agree with the agency that Barnard's descriptive literature did not show compliance with the salient characteristics of the brand name item. For example, the literature clearly shows that the controls of model 22-M are mounted on the equipment shelf and not on the column. Additionally, as the protester concedes in its submissions, the horizontal range of Barnard's proposed product is only 56 inches, while the specifications required 60 inches, and the vertical range is 17 to 18 inches, while the specifications required 24 inches. It is clear that the literature submitted with Barnard's bid both took exception to and failed to show compliance with, various of the salient characteristics. Barnard admits this is the case. We, therefore, find that the agency correctly determined that the item offered by Barnard did not conform to the solicitation's salient characteristics and that the bid was thus nonresponsive. M/RAD Corp., B-248146, July 29, 1992, 92-2 CPD ¶ 61.

As to the protester's allegation that it should have been awarded the contract based on its lower price, a nonresponsive bid may not be accepted even when it might result in monetary savings to the government since acceptance would compromise the integrity of the sealed bidding process. Trail Equip. Co., supra.

The protester, in support of its contention that its product meets the agency's needs, argues that many of the IFB's salient characteristics are "insignificant" and "arbitrary." For example, although the IFB required that the controls be on the column, the protester argues that this requirement "is a minor design consideration and does not affect the function of the unit. . . ." Similarly, Barnard states that the requirement of a horizontal range of 60 inches is "insignificant and arbitrary" and that the requirement of a 24 inch vertical range is not "crucial to [the orbiter's] use." The protester contends that the salient

characteristics only represent "distinctions between manufacturers" and do not represent "obvious benefits for patient care or staff flexibility."

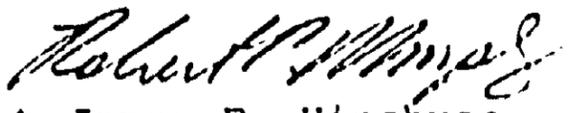
Protesters are required to file protests against solicitation improprieties apparent on the face of the solicitation no later than the time set for receipt of bids or proposals, 4 C.F.R. § 21.2(a)(1) (1993); M/RAD Corp., supra. The protester's argument that several salient characteristics listed in the IFB are insignificant or arbitrary and therefore should not have been listed as salient characteristics was not raised until after award was made, and thus constitutes an untimely protest against the IFB's terms; accordingly, we will not consider it.

Further, Barnard's argument that the salient characteristics listed in the IFB "are really those which happen to be part of the AMSCO design"--essentially that the specifications are unduly restrictive--is also untimely for the same reason.

In its comments on the agency report, Barnard argues for the first time that the award to AMSCO was improper because the model offered by AMSCO fails to meet a number of the salient characteristics listed in the IFB, including, for example, the requirement for a 60-inch horizontal range.

Barnard supports this allegation with descriptive literature from AMSCO describing its model 130M. Thus, it appears from Barnard's submissions that it believes that AMSCO did not offer the brand name and model specified in the IFB, but offered AMSCO model 130M. As noted above, the model required by the solicitation was 705M. AMSCO bid model 705M and there is nothing on the face of AMSCO's bid to indicate that the firm will not perform in accordance with the terms of the solicitation.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel