

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

60753

FILE: B-184341

DATE: April 14, 1976

MATTER OF: Omni-Spectra, Inc.

99068

DIGEST:

1. Mere promise by offeror that its item will meet RFP performance requirements when descriptive literature indicates to the contrary, is not sufficient basis upon which to determine that salient characteristics requirement of brand name or equal clause is satisfied.
2. The failure of an item to meet features of the brand name item which are not listed as "salient characteristics" affords no basis for rejection of a proposal.
3. Allegations that items do not comply with salient characteristics of solicitation raised months after protester was informed of award are untimely.

Request for proposals (RFP) No. ST 75-58, issued by the Department of State, solicited offers on a brand name or equal basis for the purpose of obtaining outdoor microwave intrusion alarm systems and standby batteries. Omni-Spectra, Inc. (Omni) submitted a proposal on its Model 300 and battery Model BA-20, the specified brand name products. However, award was made to Racon Inc., the low bidder, who offered its Racon Model 14000 system equipped with a Gel-Cel standby battery.

Omni has protested the acceptance of Racon's offer on the basis that the Racon Model 14000 did not comply in various respects with the specific salient characteristics of the brand name product contained in the RFP. These deviations from the salient characteristics of Racon's product, as noted by Omni, were that:

- (1) the Racon Model did not have an operating temperature range from -35° C to +66° C as required;
- (2) the Racon Model 14000 did not have the required Federal Communications Commission (FCC) certification; and
- (3) the Racon Model 14000 did not conform to the required operating range from 50 to 500 feet.

Our review of the administrative report indicates that two of the three alleged deviations raised by Omni are without merit. The Racon Model 14000 is and has been, for purposes of the procurement, FCC certified. The information submitted by Omni to illustrate Racon's failure to attain FCC certification refers to the Racon Model 10000 and not the Model 14000 offered in the instant case. The requirement that the transmitter and receiver operate from distances of 50 to 500 feet is fully complied with by the Racon Model 14000 whose specifications state that it operates from 50 to 1500 feet.

The third area of deviation noted concerns the operating temperature range of the Racon Model. According to Racon's descriptive literature, the operating temperature range of the Racon units was not in compliance with the specifications. However, Racon indicated on its proposal that current installations of the Racon 14000 in a variety of climates provided proof of performance in the stipulated temperature range. The Department of State determined that the Racon variance was "only" 10% from the maximum temperature limitation and was, in their view, in "substantial compliance" with the requirements of the specification. The Department of State also pointed out that critical to its determination of compliance were the facts that (1) Racon assured the Department that its units would perform satisfactorily, and (2) there was little likelihood that the units would be installed in areas where the entire temperature range would be required.

Generally, the mere promise by an offeror to conform to the salient characteristics of the solicitation does not satisfy the descriptive data requirement of the brand name or equal clause. 50 Comp. Gen. 193, 201 (1970); Struthers Electronics Corporation, B-180834, July 18, 1974, 74-2 CPD 43. Rather, the determination of precisely what the offeror is proposing and will be bound to furnish if awarded the contract must be made on the basis of the descriptive data submitted with, or referenced in, its proposal. 41 Comp. Gen. 366, 368 (1961); Struthers, supra.

Upon receipt of Racon's proposal, the procuring activity accepted that firm's assurances of compliance and did not investigate to determine whether the units proposed by Racon would, in fact, meet the requirements of the instant RFP. We do not believe that the unsubstantiated statement by Racon that its item would meet the RFP performance requirements was sufficient to satisfy the requirements of the brand name or equal clause when Racon's own descriptive literature indicates

that its commercial product does not conform to the salient characteristics requirement. Struthers, supra. It is our view that when an agency permits a deviation from a listed salient characteristic, its intention should be made known to all prospective contractors. In some circumstances, competition could potentially be inhibited if some firms believed absolute compliance with the salient characteristics was a necessity and therefore did not compete.

We note that the instant procurement was negotiated, although the basis for departing from formal advertising does not appear from the file and, except that there was no public opening of bids, the procurement was conducted much like formal advertising. We believe that as long as the agency was procuring by negotiation, however, this technical deficiency in Racon's proposal should have been resolved through discussions. In the absence of any discussions, the agency accepted a proposal which failed to demonstrate that Racon's Model 14000 met one of the salient characteristics of the brand name product.

At this time, corrective action is precluded since the units have been installed and are currently operating. We are, however, bringing this and other deficiencies in the procurement to the attention of the Secretary of State with a recommendation that action be taken to preclude a recurrence of this situation in the future.

Omni also contends that Racon's Model 14000 is not "equal" to the brand name product because the Racon unit is not listed with Underwriters Laboratories; differs in size, weight and physical configuration; and has different antenna polarization. None of these features was listed in the RFP as a "salient characteristic" of the brand name product. However, Omni contends they should be considered because the RFP's "Brand Name or Equal" clause states that the identification of a brand name item was to "indicate the quality and characteristics of products that will be satisfactory."

We believe Omni's contention is based upon an incomplete reading of the "Brand Name or Equal" clause. After the language quoted above, the clause provides that:

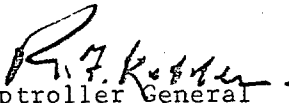
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"* * * Proposals offering 'equal' products * * * will be considered for award if such products are clearly identified in the proposals and are determined by the Government to meet fully the salient characteristics requirements listed in the request for proposals." (Emphasis added.)

The clause further states that the offeror must furnish descriptive material "necessary for the procuring activity to (i) determine whether the product offered meets the salient characteristics requirement of the request for proposals/* * *." (Emphasis added.)

It is true that the identification of a brand name item indicates the "quality and characteristics" of satisfactory products. However, this is done by listing only those salient, or prominent, characteristics of that item which are necessary to satisfy the Government's needs. The failure of Racon's product to conform to Omni's product in aspects which are not listed as "salient characteristics" affords no basis for the rejection of Racon's proposal. See Apollo Lasers, Inc., B-179423, February 21, 1974, 74-1 CPD 86.

Finally, we have noted that in a letter of October 27, 1975, Omni for the first time alleged additional areas in which Racon's product allegedly did not comply with the salient characteristics listed in the RFP. Section 20.2(a) of our Bid Protest Procedures requires protests to be filed not later than 10 days after the basis for protest is known or should have been known. Since these additional allegations were made months after Omni was informed of the award to Racon, the issues are untimely raised and will not be considered.


Deputy Comptroller General
of the United States