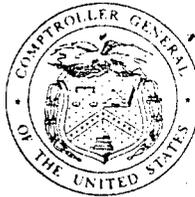


DECISION



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

Mr. Cohen

FILE: B-193704

DATE: September 27, 1979

MATTER OF: Futura Company

[Protest of Bid Rejection as Nonresponsive]

DIGEST:

1. Mere existence of "brand name or equal" clause in solicitation applicable by its terms only to items identified in schedule by "brand name or equal" description does not operate to make clause applicable to brand name parts identified only in drawings.
2. Failure of bidder offering "equal" item to indicate model number need not result in bid rejection where contracting officer reasonably can determine that only one model could possibly have been intended.
3. Where solicitation authorizes bidders to substitute "equal" products for brand name items, and upon reasonable investigation regarding offered equal contracting officer can determine acceptability of such product, bid may be accepted.

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Futura Company (Futura) protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. MSFC-8-99-5, issued on October 23, 1978, by the Marshall Space Flight Center, National Aeronautics and Space Administration (NASA), for modifications to the boiler and burner controls in the main boiler plant at the Michoud Assembly Facility, Louisiana. For the reasons set forth below, the protest is sustained.

The IFB's Bid Schedule described the requirement as follows:

"BASE BID: Work as described in Spec. No. FAC-1817 and drawing listed therein, except installation of feedwater control * * *.

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"ALTERNATE BID ITEM: Installation of
feedwater control system * * *"

The referenced specification included drawing No. MIC-BP-2185 for the work, which listed 14 panel instruments described by their functions and by the specification and part numbers of the brand name manufacturer, Bailey Meter Co. (Bailey).

The solicitation also contained the following "brand name or equal" clause:

"BRAND NAME OR EQUAL"

"(a) If items called for by this Invitation for Bids/Request for Proposals have been identified in the Schedule by 'brand name or equal' description, such identification is intended to be descriptive, but not restrictive, and is to indicate the quality and characteristics of products that will be satisfactory. Bids/proposals offering 'equal' products * * * will be considered for award if such products are clearly identified in the bids/proposals and are determined by the Government to meet fully the salient characteristics requirements referenced in the Invitation for Bids/Request for Proposals. * * *"

Paragraph 9 of the IFB's General Provisions (Construction Contract), Standard Form 23-A, entitled "Materials and Workmanship," stated:

"(a) * * * Unless otherwise specifically provided in this contract, reference to any equipment, material, article, or patented process by trade name, make, or catalog number shall be regarded as establishing a standard of quality and shall not be construed as limiting competition, and the Contractor may, at his option, use any equipment, material, article, or process which, in the judgment of the Contracting Officer, is equal to that named. * * *"

The low bid of the three received under the IFB was submitted by Futura. However, Futura indicated on the Bid Schedule that it intended to use Cleveland Controls (Cleveland) parts instead of Bailey equipment, and the bid therefore was rejected as nonresponsive. Since the second low bid was also considered non-responsive, and the remaining bid exceeded the funds available for the procurement, the IFB was canceled.

Futura asserts that in offering "equal" Cleveland items it was properly responding to what it believed was a brand name or equal purchase description. Futura based its belief on the following: (1) the general caution in the procurement regulations against the use of a brand name only purchase description, (2) the presence in the solicitation of the brand name or equal clause, and (3) the fact that the procurement was formally advertised rather than negotiated-- Futura contends that a brand name only purchase description is essentially a sole-source request that is always conducted by means of a negotiated procurement.

Futura thus contends that rather than reject its bid as nonresponsive, the contracting officer simply should have contacted the firm for additional information regarding the Cleveland parts, which the protester alleges would have established that the Cleveland parts were the equal of the listed Bailey parts. In this connection, Futura adds that the control system being procured is essentially a standard system that can be supplied by a number of combustion control manufacturers.

Futura also argues that the firm's submission of a bid bond and payment and performance bonds, and the fact that all equipment to be used in the installation of the system was to require approval by the contracting officer prior to installation, are sufficient to assure the Government that the contract would be completed in an acceptable manner. Finally, Futura asserts that, in any event, the firm is prepared to substitute acceptable parts for the Cleveland parts if the latter in fact were not to be approved by the contracting officer during contract performance.

In response to the protest, NASA, in addition to supporting the rejection of Futura's bid, raises a number of ambiguities and other deficiencies in the IFB which the agency argues are sufficient to warrant cancellation notwithstanding the responsiveness of Futura's bid, and which NASA intends to rectify in the contemplated resolicitation for the requirement. The alleged deficiencies basically concern whether the brand name or equal clause reasonably could be considered by bidders to be applicable to the Bailey parts. In this connection, NASA Procurement Regulation (PR) § 18-2.404-1(b)(1) (1977 ed.) provides that cancellation of an IFB after opening of bids may be appropriate where "inadequate, ambiguous, or otherwise deficient specifications were cited in the invitation for bids."

We first point out that in our opinion there was no reasonable basis for the protester to conclude that the brand name or equal clause applied to the Bailey parts listed in the specifications. The clause specifically refers to items "identified in the Schedule by 'brand name or equal' description" (emphasis added), and the Bailey components were neither so identified in the Schedule nor were they so described in the specifications or in drawing No. MIC-BP-2185. See Tri-Com, Inc., B-186429, November 10, 1976, 76-2 CPD 398.

Nevertheless, we believe that Futura's bid may be accepted in view of the provisions in paragraph 9 of Standard Form 23-A. The test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation. 49 Comp. Gen. 553, 556 (1970). Here, the Government's requirement as reflected in paragraph 9 of Standard Form 23-A was for Bailey parts or any substitute "which, in the judgment of the Contracting Officer, is equal to that named." We see no requirement that the contracting officer defer making that judgment until contract performance, rather than do so before award. See Vanguard Pacific, Inc., B-185397, May 12, 1976, 76-1 CPD 313. Thus, the mere fact that Futura offered Cleveland parts in place of Bailey parts is not fatal to consideration of the bid.

In addition, we do not believe that under the present circumstances the fact that Futura did not specify which Cleveland parts will be used and their characteristics necessarily must result in the rejection of the otherwise responsive bid as long as a reasonable effort by the contracting officer would disclose that only one Cleveland model could possibly be used as a substitute for each Bailey part, and that model's features. Cf. Environmental Conditioners, Inc., B-188633, August 31, 1977, 77-2 CPD 166. With respect to the model to be used, although we have recognized that where no model numbers are specified in a bid the bidder in effect may be able to elect to make an otherwise responsive bid nonresponsive, Pure Air Filter International; Thermal Control, Inc., B-188047, May 13, 1977, 77-1 CPD 342, there is no such possibility where the bidder in fact will not be able to choose between a number of units. Cf. B-169547, September 17, 1970.

Thus, if through reasonable effort and based on reasonably available information NASA can confirm Futura's position on these matters, the bid may be accepted, the solicitation reinstated, and award made thereunder to Futura. In this respect, for information to be "reasonably available" it does not necessarily have to be in the possession of the activity conducting the procurement; it need only be available to the public prior to bid opening. 50 Comp. Gen. 137, 140 (1970). We note here that both the record and our own informal investigation appear to support Futura's position.

Finally, since we have concluded that the IFB's brand name or equal clause cannot reasonably be viewed as being applicable to the Bailey parts, we cannot agree with NASA that cancellation under NASA PR § 18-2.404-1(b)(1) would have been appropriate notwithstanding the responsiveness of Futura's bid.

The protest is sustained.

R. F. Kellen
Deputy Comptroller General
of the United States