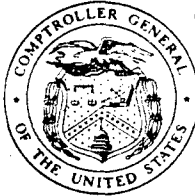


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DECISION



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

FILE: B-203581

DATE: October 9, 1981

MATTER OF: E.C. Campbell, Inc.

DIGEST:

Clause in IFB which requires that forklift trucks offered be the bidder's latest standard commercial product which has been in production, marketed and in use for one year prior to the issuance of the solicitation appears to involve bid responsiveness. Even if clause is construed as constituting a definitive responsibility standard, agency cannot award contract to bidder offering trucks which have not been in use for one year.

E.C. Campbell, Inc., a representative of Schreck Industries, Inc., protests award to Raymond Corporation under invitation for bids (IFB) No. DLA700-81-B-1426 issued by the Defense Construction Supply Center, Columbus, Ohio for four directional forklift trucks with a 4,000 pound capacity. Campbell asserts the low bidder, Raymond, proposed trucks which did not exist in Raymond's catalog and which were not standard commercial items. For reasons discussed below, this protest is sustained.

The IFB, which was issued on April 30, 1981, with a bid opening date of June 2, contained the following requirement:

"4. The truck shall be the latest model of the manufacturer's standard commercial product and shall have been in production, marketed, and in use for a minimum of one year preceding the solicitation for procurement.
* * * (emphasis supplied.)

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The solicitation did not require that bidders submit evidence with their bids to show that the trucks met this requirement but bidders were required to certify that the model offered was a standard commercial model which fully complied with the solicitation requirements. Although Raymond certified in its bid that its Model 20-4DR40TN met this requirement, Campbell contends that this model is "non-existent" in the truck line marketed by the Raymond Corporation and does not exist in its current price list or catalog. Campbell contends that after bid opening, it contacted several sales agents for Raymond and was informed that the required model was not available and had never been manufactured by Raymond. Campbell contends Raymond's bid offers to supply a 3,000 pound capacity forklift truck specially upgraded to satisfy the 4,000 pound requirement and that this would place a 33 percent increase in strain on the tractor and other load bearing components.

Raymond insists its bid is responsive and that the forklift trucks it offered meets all of the solicitation requirements. It contends it has been manufacturing and marketing the Model No. 20-4DR40TT trucks for ten years to commercial customers and that the only difference between this model and the Model No. 20-4DR40TN which it bid was that the latter had a three-stage mast rather than a two-stage mast for elevating loads to higher elevations. It denies the accuracy of the information Campbell obtained from Raymond dealers and has submitted copies of invoices showing that it sold five Model No. 20-4DR40TT trucks since November 1979.

These same invoices, however, show that the earliest shipping date for these trucks was June 11, 1980. Although Raymond states that the basic model has been manufactured and marketed for approximately 10 years, there is no documentation in the record to indicate that the truck was actually in use prior to the shipment on June 11, 1980. As the date of the solicitation was April 30, 1980, none of these Model No. 20-4DR40TT trucks could have been in use for a "minimum of one year preceding the solicitation for procurement." As the basic model does not meet the use requirement, it is immaterial whether this model has been modified to meet the specifications and is a standard commercial product in other respects.

The agency nevertheless contends that the standard commercial product requirement, which includes the requirement that the product have been in use for one year prior to the issuance of the solicitation, relates to responsibility and not to responsiveness because the requirement is concerned with the experience of the manufacturer and does not relate to any "quantifiable characteristic of the product itself." The agency notes that our Office does not review affirmative determinations of responsibility and states that it has concluded that Raymond can perform the proposed contract. Thus, the agency concludes that we should not review this determination.

We recognize a distinction between solicitation requirements relating to a bidder's capability and experience and those which are concerned with the history of the product's performance and reliability. See 52 Comp. Gen. 647, 649 (1973). The experience of the bidder is a matter of responsibility.

On the other hand, the performance history of a product is a matter of responsiveness. See 48 Comp. Gen. 291 (1968). This distinction is not always easy to draw as some provisions seem to relate to both the experience of the bidder and the reliability of the product and it becomes necessary to determine from the wording of the provision the intention of the agency. See Jensen Corporation, B-200277.2(1), June 24, 1981, 60 Comp. Gen. _____, 81-1 CPD 524.

This IFB provision seems to involve a matter of bid responsiveness since it relates to the performance history of the particular item to be procured. The clause refers to the particular truck bid rather than the manufacturer as the general subject of the requirements. More particularly, the requirement that the trucks have been in use for a year seems to indicate that the agency was seeking to assure itself that the equipment offered had been proven reliable through a year's successful operation. See Jensen Corporation, supra.

We also note, however, that the provision does not include some of the traditional elements of a responsiveness-type requirement. For example, the provision contains no language stating that bids not conforming with its terms would be rejected nor does it contain a requirement for bidders to submit information with their bids supporting their

certification that the product offered meets the provision's terms. In this regard, we have held that when requirements like those in the subject provision are held to apply to the bidder as opposed to the item being offered they constitute definitive standards of responsibility which must be met as a prerequisite to an affirmative determination of responsibility. Kepner Plastics Fabricators, Inc., Harding Pollution Controls Corporation, B-184451, B-184394, June 1, 1976, 76-1 CPD 351. We, of course will review an affirmative determination of responsibility where such definitive standards are involved. Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376.

Whether this "commercial product" clause is viewed as setting forth a responsiveness requirement or a prerequisite to an affirmative determination of responsibility, it is clear that bidders are required to provide a truck model that has been in production, marketed, and in use for one year prior to the issuance of the solicitation. The five invoices submitted by Raymond do not establish that its truck met the in use requirement. However, in view of Raymond's assertion that it has marketed the trucks for the past decade and that the invoices it submitted were "picked at random" it is possible that Raymond may be able to show that the truck model which it identified in its bid meets the one-year in use requirement. We think the agency must satisfy itself that this requirement has been met before it properly may proceed with an award to Raymond.

We are recommending by letter of today to the Director, Defense Logistics Agency that Raymond be afforded the opportunity to establish that the model truck which it bid had been in use for at least one year prior to issuance of the solicitation.

Harry R. Van Cleave
For the Comptroller General
of the United States