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

FILE: B-205306 DATE: July 27, 1982

MATTER OF: Squibb-Vitatek, Inc.

DIGEST:

1. In brand name or equal procurement, when salient characteristics are listed in terms of precise performance standards or design features, the "equal" product must meet those requirements precisely.

2. Technical requirements, stated in clear and unambiguous terms, are presumed to be material and essential to the needs of the Government. Consequently, bidders have a right to assume that such requirements will be enforced and, or the basis of them, to anticipate the scope of competition for award.

3. Proposals may not properly be evaluated on a basis which is not specified in a solicitation, and when a solicitation fails to disclose an important requirement or a factor to be used in evaluation, the procuring agency, at a minimum, must advise offerors of the omission during discussions.

4. When contracting activity discovers that equipment which does not conform to salient characteristics will meet its needs as well as brand name equipment, proper action is to reopen negotiations under amended specifications, allowing offerors to revise their proposals if desired.

5. GAO requires showing of arbitrary and capricious Government action and a substantial chance for award before bid or proposal preparation costs may be recovered.

Squibb-Vitatek, Inc. protests the award of a contract for portable patient monitoring equipment to be used in the field by the U.S. Marine Corps. The Naval Regional Contracting Office, Philadelphia, Pennsylvania, awarded a contract to Physio-Control Corporation on September 18, 1981. Because the award was made despite the fact that Physio-Control took exception to numerous salient characteristics listed by the Navy for the brand name or equal equipment, we sustain the protest.

The solicitation in question, No. N00140-81-R-6610, called for a patient monitor, Tektronix Model No. 414 with Option 21 or equal. Section C contained a five-page, detailed technical description of the Tektronix equipment. Offerors were required to guarantee that their equipment was equal in all respects--including performance, interchangeability, durability, and quality--to that specified and that any alternate make or model conformed to all the salient characteristics. Evaluation was to be on the basis of the specifications listed in Section C, all of which the Navy stated were equally important.

Squibb-Vitatek, which had purchased the patient monitor business of Tektronix and at the time in question continued to use its name, offered the brand name equipment at a unit price of $8,308.50, or $764,382 for the 92 units the Navy sought. Physio-Control, the only other offeror, proposed its VSM-1 (Vital Signs Monitor-1), which it guaranteed met the "medical intent" of the specifications. In its proposal, Physio-Control stated that it had taken exception to particular salient characteristics because they were "restrictive to competitive bidding and not medically pertinent." Physio-Control's unit price was $5,879, or $540,868 extended.

In the protest, based on a copy of the contract obtained under a Freedom of Information Act request, Squibb-Vitatek identifies the following areas in which Physio-Control's VSM-1 does not conform to the salient characteristics:

1. The cathode-ray-tube (CRT) display does not simultaneously show three waveforms (two in addition to electrocardiogram (ECG);

2. The hard copy unit does not provide recordings at pre-set intervals for purposes of developing trend information;

3. The hard copy unit does not provide alpha-numeric printouts of all digitally displayed physical parameters;

4. There is no pulsatile pressure alarm to warn of open catheters; and

5. Sealed lead-acid batteries, rather than the nickel-cadmium batteries specified, are used.

Squibb-Vitatek states that in its own initial propcsal, it had not offered to provide one feature which, although listed as a salient characteristic, was not a feature of the brand name equipment. In its request for best and final offers, the Navy informed Squibb-Vitatek that this feature must be provided. According to the protest, this discussion reinforced Squibb-Vitatek's conclusion that all specifications would be strictly enforced and that Physio-Control would not be eligible for award.

Squibb-Vitatek argues that Physio-Control's VSM-1 is so radically different from the brand name equipment that it should have been rejected immediately, rather than included in the competitive range. If the Navy wished to include Physio-Control, Squibb-Vitatek contends, it should have formally amended the solicitation or conducted discussions and given Squibb-Vitatek an opportunity to revise its proposal on the basis of the relaxed specifications. Instead, Squibb-Vitatek argues, the Navy accepted a cheaper, less sophisticated, less capable system than that required by its original specifications.

In its report, the Navy explains that the list of salient characteristics for the patient monitor was prepared by the Bureau of Medicine and Surgery in mid-1980, when the Tektronix model described was the only commercially available one that had been approved for use on shipboard, in the Fleet Marine Force, and in the Fleet Hospital. When Physio-Control proposed its VSM-1, the Naval Medical Material Support Command was asked to review it to determine whether this equipment was equal to that of Tektronix. The Command advised the contracting activity that although the two products differed in design and performance characteristics, the VSM-1 had been used at the Naval Regional Medical Center in Portsmouth, Virginia,

and was considered highly satisfactory. The Command concluded that both units met the Navy's requirements for portable patient monitors, and the contracting officer therefore determined that Physio-Control should be awarded the contract because of its lower price.

The Navy argues that:

> "Although there may be some inconsistency between the VSM-1 and the literal language used in designating salient characteristics, the VSM-1 does, in fact, meet the medical intent of the salient characteristics."

The Navy concludes that if there was any failure to comply with solicitation requirements, those requirements consisted of:

> "non-essential design characteristics of a particular product which created an improper restriction on competition."

In considering brand name or equal procurements, we have held that when salient characteristics are listed in terms of precise performance standards (operating ranges, speed, sensitivity, and the like) or design features (maximum size and weight, for example), the "equal" product must meet those requirements precisely. Cohu, Inc., B-199551, March 18, 1981, 81-1 CPD 207. Technical requirements, stated in clear and unambiguous terms, are presumed to be material and essential to the needs of the Government. Parkson Corporation, B-187101, February 11, 1977, 77-1 CPD 103. Consequently, bidders have a right to assume that such requirements will be enforced and, on the basis of them, to anticipate the scope of competition for award. American Automotive Machinery, Inc., B-204385, December 24, 1981, 81-2 CPD 494.

On the other hand, when requirements are stated in more general terms, bidders need not furnish exact duplicates of the brand name product, so long as that which they offer is functionally equivalent. Cohu, Inc., supra. For example, in Bell & Howell Company, B-203235.5, April 26, 1982, 82-1 CPD 378, we stated that "sheet-fed" was a general descriptive term for a microfiche reader/printer, and that equipment of a different design would

have been acceptable, so long as it was suitable for the agency's intended use. We found, however, that the protester had not met its burden of proving that its "roll-fed" printer was equally as capable of producing copies regardless of the horizontal or vertical orientation of the data being copied--the purpose of the agency in making "sheet-fed" a salient characteristic. See also American Automative Machinery, Inc., supra, in which we sustained a protest because a military specification for crankshaft grinders called for English gears, but the procuring agency accepted a product with metric gears which met the "intent" of the specifications.

In this case, the Navy clearly did not employ general descriptive terms in its specifications for a portable patient monitor. Rather, the equipment was described in such precise terms that Physio-Control's proposal--which our review indicates took exception to some 15 different design and performance characteristics--could not properly have been accepted.

For example, the solicitation called for both graphic and digital displays of the vital physical signs being monitored. Three waveforms--electrocardiogram (ECG) and two invasive pressures--were to be simultaneously displayed on a cathode-ray-tube (CRT). The Navy's specifications for this graphic display were very detailed: the waveforms were to be of long persistence, with a viewing area of at least 8 by 10 centimeters, and because medical personnel would be working under extreme stress, were to be configured so that "real time" was distinguishable at a glance. In addition, the solicitation stated that because users would need to make basic observations while moving around, the ECG waveform must display certain information in a manner that could be detected using peripheral vision.

Physio-Control's VSM-1 did not simultaneously display three waveforms. Instead, it displayed either ECG and one invasive pressure, or two pressures. In its proposal, the firm argued that its simultaneous digital display of numerical values for two pressures met the "medical intent" of the specifications. We disagree. The specifications required digital readouts of four physical functions--heart rate, temperature, and the systolic, diastolic, and mean values of two pressures--in addition to, not as a substitute for, the CRT display of three waveforms.

According to the protester, omission of the third waveform, which typically would display pulmonary artery pressure, is potentially dangerous. The protester has included in the record statements from an anesthesiologist that this type of visual monitoring is essential in major trauma cases. We are not prepared to make this medical judgment. We cannot, however, conclude that a patient monitor which graphically displays only two waveforms is functionally equivalent to one which graphically displays three waveforms. If the Navy found that digital display of the information provided by a third waveform was adequate, the solicitation should have been amended to so indicate.

Another example of Physio-Control's departure from the specifications (which like the failure to display three waveforms was pointed out by Squibb-Vitatek) is the internal, rechargeable battery for the portable patient monitor. The solicitation required a nickel-cadmium battery, stating that this type has a significantly longer life than other rechargeable batteries. Physio-Control instead offered a sealed lead-acid battery, which it argued was superior because of its rapid charge capability. The Navy agreed that this feature made the sealed lead-acid battery equal to or more desirable than the nickel-cadmium battery specified; however, there was nothing in the solicitation to indicate that the Navy was concerned with rapid charge capability.

In addition, the Navy now states that Physio-Control's equipment is more desirable than the protester's because the patient cables, ECG recording paper, stylus, and other components are interchangeable with those for defibrillator cardioscopes which the Navy is purchasing from Physio-Control. The Navy states that both the cost and the amount of labor required to obtain spare parts will be reduced, and general maintenance for the units will be similar. Interchangeability, however, was not listed as an evaluation factor, and should not have been a justification for the purchase of patient monitors from Physio-Control under this solicitation, since proposals may not properly be evaluated on a basis which is not specified in a solicitation. Piasecki Aircraft Corporation, B-190178, July 6, 1978, 78-2 CPD 10. See generally

Analytical Services, Inc., B-202473, March 9, 1982, 82-1 CPD 214, stating that when a solicitation fails to disclose an important requirement or a factor to be used in the evaluation of proposals, the procuring agency, at a minimum, must clearly and explicitly advise offerors of the omission during discussions.

That Physio-Control's VSM-1 met the "medical intent" of the specifications and satisfied the Navy's needs confirms the fact that the specifications were restrictive. It did not, however, permit the contracting officer to waive the specifications. Rather than accept nonconforming equipment, upon determining that either Physio-Control or Squibb-Vitatek could meet its needs, the Navy should have reopened negotiations under amended specifications. Offerors then could have revised their proposals if desired. See generally Motorola, Inc., Communications Group, B-200822, June 22, 1981, 81-1 CPD 514.

Squibb-Vitatek argues that it was prejudiced by the Navy's failure to afford it this opportunity. The firm states that if the solicitation had been amended, it would have reduced its price by deleting some items not offered by Physio-Control and would have requested waiver of one option on grounds that it added convenience, but not measurement capability, to the patient monitor. Squibb-Vitatek has submitted a list of catalog prices for these items, and argues that as a result its best and final offer would have been less than Physio-Control's. Since both products were equally acceptable to the Navy, cost could have become the determining factor, Squibb-Vitatek argues; it therefore believes it had a substantial chance for award and is entitled to proposal preparation costs.

Our Office requires a showing of arbitrary and capricious Government action and a substantial chance for award before bid or proposal preparation costs may be recovered. Monitor International, Inc., B-200756, September 14, 1981, 81-2 CPD 214. We believe Squibb-Vitatek has met the first criterion. The Navy, in effect, acknowledges that it made an award for equipment which it was fully aware did not meet specifications. Moreover, at the time we notified the Navy that Squibb-Vitatek was protesting its acceptance of Physio-Control's offer, no goods had been shipped. We generally expect agency reports on protests within 25 working days after such notification; however, we did

not receive the Navy report stating that delivery had been completed until three months later. The Navy, however, has argued that deletion of the options as proposed by Squibb-Vitatek to reduce its price would only have enhanced the desirability of Physio-Control's patient monitor. In view of this, we cannot conclude that cost would have been the determining factor or that Squibb-Vitatek had a substantial chance for award.

The protest is sustained, but the claim for bid preparation costs therefore is denied.

for Milton J. Socolar
Comptroller General
of the United States