

DECISION

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

Kingsbury
PZ-I
29327

FILE: B-215275

DATE: September 17, 1984

MATTER OF: Scanray Corporation

DIGEST:

1. In "brand name or equal" procurement, "equal" product need not meet unstated features of brand name item, but only item's salient characteristics expressed in the solicitation.
2. "Brand name or equal" procurement method does not allow for award to bidder whose product meets government's needs, but does not comply with salient characteristics. The proper remedy in this situation is a readvertisement under specifications reflecting the government's actual needs.

Scanray Corporation (Scanray) protests the award of contract No. IA-21159-24 to American Science and Engineering, Inc. (American), to provide two security screening systems for the United States Information Agency (USIA). The invitation for bids (IFB), issued on a brand name or equal basis, identified Scanray's Linescan "System Two" (System Two) as the brand name product and contained salient characteristics. Scanray protests the award on two grounds: first, that when a brand name product is identified, the product should be considered as implicitly denoting salient characteristics which must be met by an "equal" bidder even though the characteristics are not explicitly listed in the IFB; second, that American's bid is nonresponsive because the equipment offered does not meet either the implied or explicit salient characteristics of the IFB.

The protest is denied on the first ground, but sustained on the second.

Prior to soliciting bids on a security screening system to examine incoming mail and packages, USIA's Office of Security held discussions with security personnel of other federal agencies and industry representatives, including Scanray, to determine what equipment would best suit its

030029

needs. As a result of these discussions, USIA solicited bids for two security screening systems on January 26, 1984. The IFB's "brand name or equal" description read, as follows:

"PURCHASE DESCRIPTION/AGENCY SPECIFICATIONS:

Security screening system inclusive of a push-button 2 to 1 zoom function, and a pushbutton image enhancement function, and installation, Scanray Linescan System 2, OR EQUAL

"Agency Specifications

. . .

"X-Ray Source: 160 KVCp (operated at 140 KVCp).

. . .

"Salient Characteristics: The salient characteristics for the above item are as specified in the purchase description and Agency specifications herein."

Four bids were received by bid opening on February 27, 1984. American's "equal" bid was low. Scanray bid its System Two, and two other companies bid on an "or equal" basis at prices lower than Scanray's. On February 28, 1984, the "equal" bids and their attached descriptive literature were sent to USIA's Office of Security to determine whether the bids satisfied the agency's technical requirements. The Office of Security advised the contracting officer that none of the "equal" bids met the salient characteristics and recommended that the "equal" bids be rejected as nonresponsive.

Nevertheless, the contracting officer requested additional information from the "equal" bidders to further evaluate their products. After reviewing this information, the Office of Security concluded that American's "Model 100 Micro-Dose X-Ray Inspection System" (Model 100) satisfied all of the salient characteristics of the IFB. The contract was awarded to American on March 28, 1984. Delivery was to be completed on May 28, 1984.

Scanray objected to this award at a meeting with USIA on April 2, 1984, and filed a written protest with the agency 2 days later. Scanray complains that specification of its System Two as the brand name product precluded it from bidding a less expensive model which would have met the IFB's expressly stated salient characteristics. Relying on pre-bid-opening talks with USIA, Scanray says it believed that other features of its System Two, not expressly identified as salient characteristics, were nonetheless salient and were to be met by "equal" bidders. The protester asserts several technical and operational differences between Scanray's System Two and American's Model 100 and argues that the Model 100 is not "equal" to the System Two in respect to several "implicit" salient features and two expressly stated salient features.

On May 8, 1984, the agency denied Scanray's protest. The contracting officer noted that although Scanray's System Two was named in the IFB, another company's screening system could have been used as the brand name product. She also noted that talks between Scanray and the agency were outside the procurement process and improperly viewed by Scanray as a basis for assessing the agency's needs. With particular reference to the salient characteristic of an X-ray source of 160 KVCp (operated at 140 KVCp), which was not met by American's Model 100 (possessing an X-ray source of only 90 KVCp), the contracting officer explained that what USIA actually needed was a machine that could penetrate at least 10mm of steel. Since the Model 100's X-ray source penetrates 12.5mm of steel, the contracting officer considered that the model satisfied the agency's minimum needs even though the model did not comply with the 160-KVCp requirement. Viewing this discrepancy as a minor one that would not affect the suitability of American's equipment for the intended use, the contracting officer found the award proper. Not satisfied with this explanation, Scanray filed this protest with our Office on May 18, 1984, reiterating the issues raised in its agency protest.

We disagree with Scanray's contention that American's product had to comply not only with the IFB's salient characteristics, but also with the unlisted features of the System Two. The brand name or equal clause in the IFB specifically stated that bids offering "equal" products, "including products of the brand name manufacturer other than the one described by brand name," would be considered for award if they met the IFB's salient characteristics. Therefore, the plain meaning of the clause is that only those brand name characteristics which are expressly listed

in the IFB are considered "salient" and to be used in determining the acceptability of an "equal" bid--including an "equal" bid offering a product of the brand name manufacturer other than the referenced brand name product. If Scanray objected to the procedure found in the brand name or equal clause for assessing the acceptability of an allegedly "equal" product or to the stated salient characteristics, it should have filed a protest prior to bid opening. Further, USIA was not bound by any prebid, oral advice allegedly given to Scanray about "implied" salient characteristics. See paragraph 3, Explanation to Offerors, of the IFB's Solicitation Instructions and Conditions, which provides that the procuring agency's preaward, oral explanations will not bind the agency.

Consequently, if Scanray believed it could have submitted a cheaper model otherwise in compliance with the IFB's express salient characteristics, it should have done so as this bidding approach was obviously permitted by the IFB.

Turning to Scanray's complaint that American's bid is nonresponsive because the Model 100 system does not conform to the "X-Ray Source" characteristic, we note that the responsiveness of an "equal" bid depends on the completeness and sufficiency of descriptive material submitted with the bid, or readily available to the agency. Le Prix Electrical Distributors, Ltd., B-212518, Dec. 27, 1983, 84-1 C.P.D. ¶ 26. If the contracting officer is unable to determine whether the item meets the salient characteristics from this information, the bid must be rejected as nonresponsive. Id. However, if an "equal" bid includes a model number, information describing the model may be supplied after bid opening to show conformance with the salient characteristics, if that information was in existence before bid opening. MEMM General, Inc., B-210939, May 31, 1983, 83-1 C.P.D. ¶ 579.

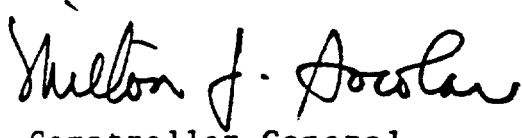
After bid opening, American submitted pages from the service manual for its Model 100 and attempted to show that the model met the required salient characteristics. American also submitted a one-page summary of the information detailed in the service manual for each salient characteristic. The summary appears to have been prepared after bid opening because it is entitled "Annotated Bid Response To Solicitation No. IFB 49-24-4-BP." On this page (but not in the service manual), American explains how its X-ray source operating at 90 KVCp is functionally equivalent, or superior to, Scanray's System Two. Specifically, American

stated on this summary page that its Model 100's "X-Ray Source" allows "penetration of steel up to 12.5mm" when operated at 90 KVCp--a statement which is not found in its service manual. Since this statement was prepared after bid opening, it should not have been considered to determine American's responsiveness. MEMM General, Inc., B-210939, supra. In any event, American's explanation did not show that its X-ray source characteristic precisely met the IFB's salient characteristic which required operation at 140 KVCp.

If the salient characteristic is a precise performance feature, as with the X-ray source characteristic, the "equal" product must meet the precise requirement. Cohu, Inc., B-199551, Mar. 18, 1981, 81-1 C.P.D. ¶ 207. A contracting officer does not have discretion to waive clearly identified characteristics because of the potential injustice to other bidders who have a right to assume that clear and unambiguous requirements will be enforced. American Automotive Machinery, Inc., B-204385, Dec. 24, 1981, 81-2 C.P.D. ¶ 494.

Therefore, although American's Model 100 screening system may have satisfied the agency's needs, the model did not meet the required X-ray source voltage of 160 KVCp when operated at 140 KVCp. If USIA had more carefully stated its needs for this characteristic, other bidders (including Scanray) might have offered a suitable product at a lower price than American. Indeed, as noted above, Scanray insists that it would have bid a cheaper model had it known USIA's true needs. We have held that because of potential unfairness to other bidders, the proper remedy in this situation is to resolicit the requirement with revised specifications reflecting the government's actual needs. American Automotive Machinery, Inc., B-204385, supra.

We sustain the protest but, since the contract has been completed, we cannot recommend that the requirement be resolicited.


for Comptroller General
of the United States