The Comptroller General
of the United States

Washington, D.C. 20548

# Decision

Matter of: U.S. Technology Corporation

File: B-224372

Date: October 2, 1986

## DIGEST

1. Fact that a manufacturer has been granted exclusive rights to use a brand name as a trademark does not affect the law to be applied in determining whether an agency can properly accept an equivalent product when the words "or equal" have inadvertently been omitted from a brand name solicitation.

2. Although inadvertent omission of "or equal" language renders a brand name or equal solicitation defective, the agency may make an award under it if the government's needs are met and no offeror is prejudiced.

3. Where an apparently noncompetitive solicitation, i.e., one specifying a brand name product only, becomes competitive, the procuring agency generally must advise the manufacturer that it intends to consider offers for equivalent products and allow the firm an opportunity to amend its offer.

4. Where a solicitation specifies a brand name product only, but lists salient characteristics for the product, the manufacturer should assume that the agency will also consider offers for equivalent products.

5. Where the manufacturer of a brand name product does not argue that it would have lowered its price or offered an equivalent product if it had known that the agency would consider offers for such products, the manufacturer has not shown that it was prejudiced by the omission of "or equal" language from a solicitation.

## DECISION

U.S. Technology Corporation protests the award of a purchase order to Budd Chemical Company under request for quotations (RFQ) No. DAAC67-86-Q-0457, issued by the Letterkenny Army Depot, Chambersburg, Pennsylvania. The solicitation was for

abrasive plastic granules used for cleaning metal, plastic, and other surfaces. The protester contends that the purchase description restricted the procurement to its trademarked products and did not permit the Army to consider the awardee's equivalent products. We deny the protest.

The RFQ included four line items covering various types and quantities of the cleaning compounds, which are used in conjunction with a pressurized air stream. Line items 1 and 2 were described as "Blast, Plastic, Type III," with salient characteristics such as hardness, density, and moisture content. Line items 3 and 4 were described as "Blast, Media, Ployplus," with no salient characteristics. The procurement was handled as a small purchase and was synopsized in the Commerce Business Daily. Seven firms, including U.S. Technology, submitted quotes; the agency awarded a $11,665 purchase order to Budd, the low aggregate offeror, on June 13, 1986.

According to the protester, "Type III" and "Polyplus" are trademarks that the Commissioner of Patents and Trademarks granted it the exclusive right to use on September 10, 1985. The firm argues that in the absence of "or equal" language, as well as salient characteristics for Polyplus, only U.S. Technology can satisfy the Army's requirements. The protester points out that each line item included a 5-digit federal supply code for manufacturers that identified its parent company, U.S. Plastic and Chemical Corporation, and that line item 4 also included a special item number referenced in its own Federal Supply Schedule contract. The protester concludes that the awardee will not be able to provide the brand name products described in the solicitation, so that the Army should have rejected its quote.

The Army states that although it intended to procure the cleaning compounds on a competitive basis, it inadvertently left the words "or equal" out of the purchase description. The agency argues, however, that given the competitive response to the RFQ, the marketplace understood its intent to procure competitively. The agency maintains that "Type III" and "Polyplus" are recognized in the industry as generic descriptions of specific hardness levels of the plastic granules, and adds that it was not aware when it drafted the purchase description that the two terms were trademarks. (An interested party further argues that because the terms have previously been used in military and commercial solicitations, they are in the public domain and not entitled to trademark protection.) The agency concludes that it

considered quotes on an "or equal" basis and determined that Budd's proposed products are equivalent to U.S. Technology's products and meet its needs.

In our opinion, this procurement is similar to any other in which only a brand name product is specified. The fact that the manufacturer has been granted exclusive rights to use the brand names as trademarks does not affect the law to be applied in determining whether the agency could properly accept an equivalent product, and the protester does not allege trademark infringement.

Under the Federal Acquisition Regulation (FAR) a purchase description generally should, at a minimum, identify requirements by use of a brand name followed by the words "or equal." FAR, 48 C.F.R. § 10.004(b)(3) (1985). However, even if the omission of the "or equal" language rendered the solicitation defective, the Army here could nontheless make an award under it if the government's needs would be met and no offeror is prejudiced. See Contact International, Inc.--Request for Reconsideration, B-210082.2, Sept. 2, 1983, 83-2 CPD ¶ 294. Since there is no dispute that Budd's products meet the government's needs, the issue is whether U.S. Technology was prejudiced by the defective solicitation.

We have held that when an apparently noncompetitive RFQ, for example, one identifying a specific firm's part number, becomes competitive, the procuring activity must amend it and provide the specified manufacturer with an opportunity to amend its quotation. 47 Comp. Gen. 778 (1968); Sargent Industries, B-216761, Apr. 18, 1985, 85-1 CPD ¶ 442. In such cases, we have identified two circumstances where there is otherwise a potential for prejudice: (1) where the brand name manufacturer was unaware of competition and assertedly would have offered a lower price had it been advised of it; and (2) where the brand name manufacturer also had an "equal" product which it assertedly would have offered if the agency had advised it of the competition. Id.

In this case, the RFQ listed salient characteristics for the "Type III" cleaning compound in line items 1 and 2. Therefore, even in the absence of "or equal" language, we believe that the protester could reasonably assume that the Army would consider offers of equivalent products for these items. See Environmental Tectonics Corp., B-222568, Sept. 5, 1986, 86-2 CPD ¶ _____. Remaining at issue are line items 3 and 4, where no salient characteristics for "Polyplus" were listed. Although line item 3 included the brand name, along with a federal supply code for manufacturers that identified U.S.

Plastic and Chemical Corporation, it did not include a national stock number unique to the product. See Federal Property Management Regulations, 41 C.F.R. subpart 101-30.1 (1985). In the absence of this additional information, we think it less reasonable for the protester to assume that the procurement was restricted to its trademarked products. For line item 4, the purchase description included the brand name, the federal supply code for manufacturers, and the special item number from the protester's Federal Supply Schedule contract. This special item number is unique to the protester's product. Under these circumstances, we believe the protester might reasonably assume that only its "Polyplus" would be acceptable for this item.

We are not convinced, however, that the protester was prejudiced by the omission of the "or equal" language from any of the line items. The protester does not argue, and it otherwise does not appear, that the firm would have been able to offer its "Type III" and "Polyplus" products at a price less than Budd's quoted price, even if it had been informed that the Army sought competition. See Spacesaver, B-224339, Aug. 22, 1986, 86-2 CPD ¶ ____. Nor does the protester allege that it could have offered an equivalent product at a competitive price. Consequently, the award to Budd is not legally objectionable.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel