

Yogany



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Astrophysics Research Corporation
File: B-224532
Date: January 16, 1987

DIGEST

Discrepancy of 10 lbs. between 410 lbs. X-ray screening machine bid and 400 lbs. IFB requirement in a brand name or equal purchase description should have been waived as a minor informality since it represented an inconsequential variation as the machine still met the agency's minimum needs, and where brand name manufacturer or other bidders failed to show that they would be prejudiced by a waiver.

DECISION

Astrophysics Research Corporation (ARC) protests the rejection of its bid under invitation for bids (IFB) No. 0000-620061 issued by the Department of State for security X-ray equipment used in screening incoming mail. ARC's bid was rejected because the equipment it offered did not conform to the salient characteristics listed in the brand name or equal solicitation. ARC contends that its equipment does, in fact, comply with the requirements of the solicitation but that there was an obvious and minor clerical error in the technical literature attached to its bid which erroneously indicated that the equipment did not meet the solicitation's weight requirement. ARC maintains that the Department of State should have waived this minor deviation from the weight requirement, especially in view of ARC's substantially low price.

We sustain the protest.

The solicitation, as originally issued, solicited bids for a requirements contract for a quantity of MinXray X-ray inspectors (110 volts and 220 volts) or an equal product. However, the salient characteristics (mandatory specifications) included in the solicitation did not correctly state the features of the brand name unit. For example, the solicitation specified that the weight of the equipment "shall not exceed 300 lbs.," which was not the weight of the brand name unit. The requiring activity within the Department of State, the

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Bureau of Diplomatic Security (Bureau), and a MinXray representative, advised the contracting officer about this error. Further, the Bureau provided the contracting officer with a copy of MinXray's standard commercial specifications that are in use nationally and internationally, which indicated that the brand name MinXray equipment had a weight of "approximately 400 lbs." The Bureau further indicated to the contracting officer that the Department of State required "as small and lightweight a unit as possible," since the larger the unit was the more difficult it would be to transport the equipment to posts abroad and to use efficiently once there. The contracting officer then amended the solicitation to provide that the weight of the unit "shall not exceed 400 lbs." The solicitation, as issued, and as amended, contained the standard brand name or equal clause stating that any bids offering "equal" products would be considered if they fully met the salient characteristics listed in the IFB.

ARC submitted a bid offering its Mailscan II X-ray screening equipment. The firm had never previously produced this exact unit but was offering a "newly developed system" specifically for this Department of State requirement although the firm intended to incorporate features of its standard unit into the system. The protester included technical specifications describing the equipment with its bid. While, as stated above, the solicitation's mandatory specifications in the work statement required that the equipment "shall not exceed 400 lbs.," ARC's technical specifications stated that its equipment weighed 410 lbs. After reviewing the matter, the Department of State concluded that ARC's bid was nonresponsive for failing to meet the solicitation's weight requirement. Award was thereafter made to Security Defense Systems Corporation (SDS), the second low bidder. This protest followed.

ARC argues that the 10 lb. (2.5%) variation was an obvious clerical error that should have been corrected by the Department of State as an apparent clerical mistake since the equipment, in fact, weighs 390 lbs. ARC notes that the cover letter in its bid stated that ARC's offer was in "complete compliance with the specifications." Further, ARC states that acceptance of its bid would represent a savings of \$700,000 to the government since ARC's low bid was \$3.1 million while the second low bid was \$3.8 million. Accordingly, ARC concludes that the slight weight variation should be waived as a minor, insignificant and immaterial deviation, especially in view of the substantial cost savings represented by its bid.

SDS, however, in comments filed as an interested party, argues that the weight variation was not an obvious clerical error but that ARC is attempting to correct an engineering mistake since ARC has never produced this unit and therefore the alleged 390 lbs. weight of the unit is still only an estimate.

Generally, when a brand name or equal purchase description is used, it is incumbent upon the bidder who offers an "equal" product to establish that its product will meet the salient characteristics of the brand name product. The E.A. Kinsey Co., B-211832, July 11, 1983, 83-2 CPD ¶ 75. Further, where a solicitation sets forth in very specific terms the design features, such as size or weight, that the equal product has to meet, the equal product must meet that requirement precisely. Cohu, Inc., B-199551, Mar. 18, 1981, 81-1 CPD ¶ 207.

However, this rule does not apply where the deviation in a bid is minor and immaterial and does not render the "equal" product functionally inferior to the brand name product, and where the brand name manufacturer or other bidder is not prejudiced by the agency's waiver of the deficiency as minor. Magnaflux Corp., B-211914, Dec. 20, 1983, 84-1 CPD ¶ 4; Champion Road Machinery International Corp., B-220678, July 13, 1981, 81-2 CPD ¶ 27; see also Evans, Inc., B-216260.2, May 13, 1985, 85-1 CPD ¶ 535. Thus, where the defect in a bid is merely a matter of form and not of substance or pertains to some immaterial or inconsequential variation of a bid from the exact requirements of the solicitation, the defect must be waived or the bidder must be given an opportunity to cure it. In this regard, a defect or variation is immaterial when its significance as to quality, quantity, delivery or price is trivial or negligible when compared with the total cost or scope of supplies or work to be furnished. Champion Road Machinery International Corp., B-200678, supra. Under appropriate circumstances, we have approved waivers by agencies of minor variations in bids. For example, where the solicitation specified a 170 horsepower machine, we have held that a bid offering 168 horsepower was responsive. Champion Road Machinery International Corp., B-200678, supra. Further, where a solicitation required a 30-inch bath tank, we have held that a bid offering a 29-1/2-inch bath tank was responsive. Magnaflux Corp., B-211914, supra.; see also Evans, Inc., B-216260.2, supra (discrepancy of 1.5 inches between solicitation dryer dimension requirement of 120-inch and 118.5-inch dryer offered by bidder may be waived).

Here, regardless of how the error occurred, the deviation in question amounts to only 10 lbs. and the agency does not state that ARC's machine, even at 410 lbs., does not meet its minimum needs, although the agency does argue that it should not have "to demonstrate with mathematical precision exactly which straw would break the camel's back." Moreover, SDS has failed to demonstrate here that it was prejudiced, that is, that it could have offered a unit with a 10 lbs. variation that could have rendered SDS the lowest-priced bidder. See Magnaflux Corp., B-211914, supra. In light of these circumstances, then, we believe that waiver of the deviation should have been granted and we sustain the protest on this issue.

ARC's initial protest to our Office was filed 8 calendar days after the award to SDS. Although we notified the agency of the protest on the same day it was filed, the Department of State permitted SDS to continue contract performance, finding that it would be "not in the best interest of the Government" to direct SDS to cease performance.

The bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (Supp. III 1985), require a federal agency to direct a contractor to cease performance where the contracting agency receives notice of a protest within 10 days of the date of contract award unless the head of the responsible procuring activity makes a written finding either that contract performance is in the best interests of the United States or that there are urgent and compelling circumstances which do not permit waiting for a decision. 31 U.S.C. § 3553(d). Where the agency allows performance to continue without a finding of urgent and compelling circumstances, we must recommend any required corrective action without regard to any cost of disruption from terminating, recompeting or reawarding the contract. 31 U.S.C. § 3554(b)(2).

By separate letter to the Department of State, we are therefore recommending that, if ARC is otherwise eligible, the agency should terminate for convenience the contract awarded to SDS, and make award to ARC.

The protest is sustained.

for 
Comptroller General
of the United States