



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Autoquip Corporation  
**File:** B-226014  
**Date:** May 15, 1987

---

### **DIGEST**

Protest by brand-name offeror under negotiated brand-name-or-equal procurement that agency improperly made award to firm whose proposal was "nonresponsive" because its "equal" product did not conform to one of the salient characteristics listed in the solicitation is denied where agency obtained a clarification from the "equal" offeror through telephonic discussions and record does not support protester's contention that agency arbitrarily concluded that the requirement would be met.

---

### **DECISION**

Autoquip Corporation protests the award of a contract to Giant Lift Equipment Manufacturing Co., Inc., under request for proposals (RFP) No. N00612-86-R-0493, issued by the Naval Supply Center, Charleston, South Carolina. Autoquip complains that Giant's offer is "nonresponsive." We deny the protest.

This procurement, conducted on behalf of the Charleston Naval Shipyard, was for a quantity of 6 (later reduced to 1) fork truck service lifts. A service lift is a device onto which a forklift truck is driven and is then raised to a height of approximately 6 feet so that the vehicle's wheels and undercarriage are accessible for repair by a mechanic who stands beneath it. Both Autoquip and Giant manufacture equipment to perform this function although the designs of their products are fundamentally different.

The brand-name-or-equal solicitation, issued on April 28, 1986, set forth a requirement for "Autoquip Corp. . . . Excalibur type or equal . . ." lifts. As

038954

originally issued, the RFP listed six salient characteristics of the Autoquip brand-name item, none of which have been placed in issue by Autoquip's protest.

On May 20, 8 days before initial proposals were due, Autoquip sent a mailgram to the Navy requesting that the Navy add three salient characteristics to the solicitation to "more clearly define the fork truck service lift that would be comparable to Autoquip's Excalibur." The third of these three "salient characteristics" would require that "all four wheels of lifted fork truck shall be free to turn."<sup>1/</sup> By amendment No. 0001, issued on May 28, the Navy extended the due date for receipt of offers to June 18. On June 16, the Navy issued amendment No. 0002 to the solicitation to include the additional "salient characteristics" recommended by Autoquip.

According to the Navy, on June 17, Giant telephoned the Navy to complain that the salient characteristics contained in amendment No. 0002 restricted competition to Autoquip only, in part because on the Giant lift, only two truck wheels could turn at a time.<sup>2/</sup> The Navy's buyer relayed Giant's objections to the requisitioner. That same day, the Navy issued amendment No. 0003, rewording the salient characteristics set forth in amendment No. 0002 in light of Giant's objections. With respect to the third "salient feature" recommended by Autoquip and accepted by the Navy, the solicitation was amended to read "Two-four wheels of lifted fork truck shall be free to turn." The time for receipt of offers also was extended to June 30.

---

<sup>1/</sup> In its commercial descriptive literature, attached to the shipyard's purchase request, Autoquip states that its unit, which is of cantilever design, lifts the truck by steel pick-up bars which contact the frame of the truck. Since the truck, when raised, does not rest on its wheels, all four wheels of the truck are free to rotate, or turn, without the use of special adapters or fixtures, which Autoquip claims facilitates the servicing of components such as wheels and brakes.

<sup>2/</sup> Although there are discrepancies in the record as to the date of the telephone conversation and which amendment was discussed, our review of the record and the substance of the telephone conversation indicate that the telephone conversation took place on June 17 and that all parties were referring to amendment No. 0002.

On June 25, the Navy issued amendment No. 0004, which changed the specification in two respects not in dispute in this protest. The due date for receipt of offers was further extended to July 7.

On June 26, Autoquip complained to the Navy that the change in wording regarding how many wheels of a lifted fork truck should turn while on the lift ("two-four") was ambiguous. Although Autoquip requested an amendment to clarify this salient characteristic, the Navy took no immediate action in response to Autoquip's complaint.

It appears to us that Autoquip's proposal, dated May 12, 1986, and Giant's proposal, dated May 27, already had been submitted prior to the issuance of amendment No. 0001 on May 28, the very day proposals were due, ostensibly extending the due date for initial proposals. Although literally read, amendments Nos. 0001 through 0004 extended the due date for submission of initial offers from May 28 to July 7, in actuality initial offers were submitted on or before the original due date and both offerors acknowledged receipt of the subsequent amendments as they were issued.

Autoquip offered to provide the brand-name item. Giant -- offered as an "equal" its Luberlift Model LL-20. The Navy evaluated Giant's offer on the basis of a brochure concerning Giant's products, 2 pages of which concerned the Luberlift Model LL-20.

Amendment No. 0005 was issued on September 5; it advised offerors that negotiations were opened, that "the government will consider for award only those proposals which offer equipment that allows 4 wheels to turn . . . ." and that best and final offers (BAFOs) were due by September 19.

Giant acknowledged receipt of amendment No. 0005, a copy of which it returned to the Navy along with a cover letter in which it stated that it "propose[d] no change in pricing or materials offered; all requirements are complied with." Giant was the low offeror; the protester was second low.

On September 23, according to a Navy memorandum, a representative of the shipyard--which apparently had been asked to conduct a technical review of the offers--came by the procurement office to again review Giant's brochure in order to determine if the lift being offered was acceptable. This person stated that "he needed to be sure how the drive wheel[s] become free to rotate." Apparently unable to discern this from the brochure, he telephoned the president of Giant who told him that "there is a bar that goes under

the chassis of the [fork truck] in the front and back that allows the wheels to be free."

On October 7, the shipyard advised the contracting officer that the "equipment" offered by Giant was "satisfactory." The shipyard, however, requested that the quantity to be purchased be reduced from six to one. This change was implemented by amendment No. 0006, which requested the submission of BAFOs on the basis of the reduced quantity. Giant remained the low offeror after BAFOs and received the award.

On being informed of the contract award to Giant, Autoquip protested to the Navy, and having received no response, then filed its protest in our Office.

Autoquip argues that Giant's Luberlift Model LL-20 lifts fork trucks by their fixed drive wheels and a counterweight support bar mounted on a platform and, therefore, the unit is "nonresponsive" to the solicitation requirement that all four wheels of a truck, when elevated, be free to turn. In response, the Navy asserts that there is nothing wrong in a negotiated procurement in conducting negotiations to determine the "feasibility" of offers submitted. Because it was unsure from Giant's literature whether its unit could meet the "all 4 wheels free" requirement it inquired of Giant by telephone and was satisfied by the advice it received. In addition, the Navy suggests that what is involved in this case is an affirmative determination of Giant's responsibility which our Office has stated it will not review, according to the Navy, unless it is shown "to be without a reasonable basis." Finally, the Navy argues that if Giant, in fact, would deliver a nonconforming product, that would be a matter of contract administration which our Office does not review under our Bid Protest Regulations.

At the outset, we point out that the Navy's argument that this protest concerns the matter of Giant's responsibility is without merit. Responsibility refers to an offeror's apparent ability and capacity to perform all of the current requirements. See DAVSAM International, Inc., B-218201.3, Apr. 22, 1985, 85-1 C.P.D. ¶ 462. Here, Autoquip is not questioning Giant's ability to perform the contract. Rather, Autoquip is complaining that Giant did not offer what was called for in the solicitation.

At the same time, we must note that Autoquip emphasizes that its offer is the only "responsive" one. The concept of "responsiveness," as used by Autoquip, generally does not apply to negotiated procurements as it applies to sealed bid procurements. See Xtek, Inc., B-213166, Mar. 5, 1984, 84-1 C.P.D. ¶ 264. There is a flexibility inherent in a

negotiated procurement, not possible in a sealed bid one, of which the Navy took advantage here.

Amendment No. 0005 advised all offerors that the "government will consider for award only those proposals which offer equipment that allows 4 wheels to turn . . . ." In acknowledging receipt of that amendment, Giant advised the Navy that "all requirements are complied with." Descriptive literature in the Navy's possession, however, depicted the lifting platform on Giant's product as one on which the fork truck was supported by its wheels on one end and by a crossbar on the other. Since the wheels on one end were weight-bearing they were not free to turn as the solicitation required.

The uncertainty created by this situation prompted the Navy to telephone Giant for the specific purpose of determining how Giant would meet this requirement and was told that Giant would place crossbars "front and back" so that all the wheels would be free. This explanation satisfied the shipyard's technical personnel who subsequently advised the contracting officer that Giant's product was considered satisfactory.

We have held that an offeror need not furnish an exact duplicate of the brand name product in design or performance. Cohu, Inc., B-199551, Mar. 18, 1981, 81-1 C.P.D. ¶ 207. Rather, the "equal" product offered must meet the salient characteristics of the brand name product that are specified in the solicitation. It is not inappropriate for a contracting agency to conduct discussions with the offeror of an "equal" product in order to make that determination. With regard to a similar protest by a brand-name offeror we noted:

" . . . the Army had some communication with [the 'equal' offeror] to better determine whether [that firm's] unit conformed to the salient characteristics of the [protester's brand-name] unit. The Army had no questions about [the protester's] proposal to furnish the brand name product and thus did not conduct any type of discussions with [the protester] before requesting best and final offers from both firms. We have recognized that an agency may conduct discussions with only those offerors about whose proposals the agency has questions concerning perceived deficiencies, as long as all offerors in the competitive range are afforded an opportunity to submit a best and final offer. See e.g., Tracor Jitco Inc., B-208476, Jan. 31, 1983, 83-1 C.P.D. ¶ 98. Thus, we see

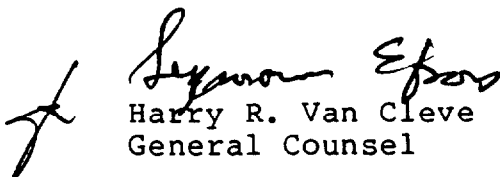
nothing improper with the Army's actions here."  
Magnaflux Corp., B-211914, Dec. 20, 1983, 84-1 C.P.D.  
¶ 4.

Here, too, there was uncertainty as to whether Giant's product would meet one of the salient characteristics listed in the solicitation, which was resolved to the Navy's satisfaction through a telephone conversation.

Autoquip maintains that Giant's commercially-available product as described in its brochure cannot meet this requirement without modification which, under the terms of the RFP's "Brand Name or Equal" clause, should have been clearly identified and described in its proposal. As a general proposition, we agree with Autoquip's understanding of this solicitation provision. Here, however, we are dealing with a salient characteristic which was not even in the solicitation as issued, about which the Navy vacillated in the course of the procurement, and which was not finally established as a requirement until amendment No. 0005. The Navy, therefore, had to determine whether Giant would meet this requirement toward the conclusion of the procurement, not at its outset, and it went about it in an expeditious manner. The Navy received an explanation from Giant which its technical personnel determined to be adequate, a conclusion which we cannot say on the record before us was arbitrary. (We note one option listed in Giant's descriptive literature is an "additional counterweight bar.") In this context, where a salient characteristic is not established until the conclusion of the procurement, we do not think it objectionable for Giant not to have earlier addressed it in its proposal.

Autoquip was given the same opportunities as Giant to submit BAFOs; no discussions with it on the requirement at issue were necessary since it offered the brand name product. In fact, this requirement was added to the solicitation at Autoquip's instigation. We therefore fail to see how the protester was prejudiced by the Navy's inquiry of Giant.

Protest denied.

  
Harry R. Van Cleve  
General Counsel