



**Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** Allentown Caging Equipment Co., Inc.  
**File:** B-240494  
**Date:** November 5, 1990

Bruce M. Schragger, Esq., Albert, Schragger, Lavine, Levy & Segal, for the protester.  
 Michael J. Ferro, Jr., Esq., Ferro, Lippman, LaBella & Logerfo, for Lab Products, Inc., an interested party.  
 James F. Trickett, Department of Health and Human Services, for the agency.  
 George Ruppert, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Where a brand name or equal solicitation required submission of descriptive literature sufficient to establish that the offered product conforms to the salient characteristics and bidders were advised that failure to do so would require rejection of their bids, the procuring agency properly rejected as nonresponsive a bid that included descriptive literature which failed to address two salient characteristics.

### DECISION

Allentown Caging Equipment Co., Inc. protests the rejection of its bid as nonresponsive, and the award of a contract to Lab Products, Inc., under invitation for bids (IFB) No. 263-90-B(67)-0001, issued by the Department of Health and Human Services, National Institutes of Health (NIH), on a brand name or equal basis, for a system of small animal cages, racks and shelves. Allentown's bid was rejected on the basis that the descriptive literature it submitted did not adequately demonstrate compliance with at least two of the salient characteristics of the specified brand name item. Allentown maintains that its literature was adequate and that its bid therefore was responsive.

We deny the protest in part and dismiss it in part.

The IFB required equipment manufactured by Lab Products, or equal, and listed salient characteristics for six of the seven items (the seventh item was not specified as a Lab

09973/142626

Products brand name). The IFB advised that bids offering equal products would be considered for award if the products fully met the salient characteristics referenced in the IFB. The IFB included Federal Acquisition Regulation (FAR) § 52.214-21, which states that descriptive literature is required to establish that an offered product meets solicitation specifications, and that the term pertains to significant elements such as (1) design; (2) materials; (3) components; (4) performance characteristics; and (5) methods of manufacture, assembly, construction, or operation. The IFB advised that failure of the literature to show that the product offered conforms to the requirements of the solicitation would result in the rejection of the bid.

Three bids were submitted by the December 8, 1989, bid opening date. Thoren Caging System, offering an equal product, was the apparent low bidder, and Allentown, also offering an equal product, was second-low. NIH rejected Thoren's and Allentown's bids because a review of their descriptive literature indicated that both of the equal products failed to meet certain salient characteristics. Specifically, the agency found that Allentown's descriptive literature failed to indicate compliance with (1) the HEPA Filter Air Supply System, as set forth in the IFB's salient characteristics for item No. 1. This section states that the "air supply manifold shall be removable from rack for cleaning"; and (2) the requirement that the micro-isolator filter top have a protective grid to prevent contact by hands or fingers, as stated in the salient characteristics for item Nos. 4, 5 and 6. NIH thus made award to Lab, the next low bidder, based on its offer of its own brand name items.

Allentown contends that its offered product fully conforms to the salient characteristics of the IFB; that Lab's bid is nonresponsive; and that it submitted the most cost effective bid. Allentown argues that even though its descriptive literature failed to note that its air supply manifold was removable from the rack for cleaning, as required, this should not have caused the agency to assume that the air supply manifold was not removable since the firm's bid did not note any deviation from the specifications. Also, Allentown states that even though the word "removable" was not present, its drawing was not presented in a manner which would indicate that the manifold was non-removable. Allentown contends that it would have been confusing, impossible, and unnecessary to note every minor detail of the specifications on its drawings. The protester states that since it did not note any deviation from the specifications, the assumption should have been that the item was in fact removable, consistent with assumptions by NIH that other minor items not specifically noted on its drawings conformed to the specifications. With regard to the micro-isolator filter top requirement, Allentown states that

although its drawings did not specifically diagram the presence of a grid arrangement on the filter top, its micro-barrier filter top does in fact have a metal grid which is inserted over the filter to prevent filter contact by hands or fingers, as required by the specifications. Allentown states that any deviation from the salient characteristics would have been noted in its drawings or descriptive literature.

To be responsive to a brand name or equal solicitation, bids offering equal products must conform to the salient characteristics of the brand name equipment listed in the solicitation. Tri Tool, Inc., B-233153, Jan. 25, 1989, 89-1 CPD ¶ 84. Where descriptive literature is required to establish conformance with the specifications, and bidders are so cautioned, the bid must be rejected as nonresponsive if the literature submitted fails to show clearly that the offered product conforms to the specifications. JoaQuin Mfg. Corp., B-228515, Jan. 11, 1988, 88-1 CPD ¶ 15.

Allentown's bid and literature did not demonstrate that the offered equal item met all of the salient characteristics set forth in the IFB; the features listed above, set forth in the IFB as salient characteristics, simply were not addressed in the descriptive literature furnished with Allentown's bid. This being the case, contrary to Allentown's position, there was no basis for NIH to assume that the firm's offered item met the salient characteristics in question. As the solicitation clearly indicated, it was Allentown's responsibility to identify the salient characteristics in the IFB and assure that the literature furnished with its bid, or the bid itself, clearly indicated compliance with those characteristics. NIH was not required to ignore Allentown's failure to do so by assuming that its item met all salient requirements. Indeed, it obviously was NIH's desire to avoid having to rely on such assumptions as to offered items that led it to include a comprehensive descriptive literature clause in the IFB in the first place. Allentown's bid therefore properly was rejected as nonresponsive. Since Allentown's bid was properly determined nonresponsive, it could not be considered for award even though its price was lower than Lab's.

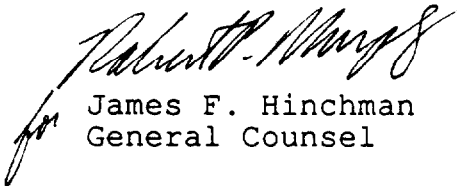
Allentown complains that, even if its bid did not clearly demonstrate compliance with the salient characteristics, Lab's brand name bid also was nonresponsive to the micro-isolator filter top requirements, in that the inside (bottom side) of Lab's filter top does not prevent hand or finger contact and, in fact, presents significant exposure of the filter media. Allentown notes in this regard that in the demonstration video provided by Lab, which was available to the government during examination of the bids, the filter top is removed for the cleaning of the cages and turned upside down, thus readily

exposing the filter media to contact with the technicians' hands.

This allegation is without merit. Lab bid the brand name item, with no exceptions. NIH explains that the micro-isolator filter top salient characteristic was solely to insure protection of the filter media on the top surface, which otherwise would be exposed during operation; the inside (bottom) of the filter tops ordinarily are not exposed to technicians' fingers or hands. Allentown's protest letter indicates it in fact understood that the agency intended to require protection only of the top side of the filter top, since it states that its metal grid would have been "inserted over the filter"; Allentown's approach therefore also would not have protected the filter media from the inside of the filter top. Lab's bid therefore was responsive to the micro-isolator filter top salient characteristic.

In its comments on the agency's report, Allentown argues for the first time that the IFB was defective because of alleged improperly listed Lab catalog numbers in the solicitation. This ground of protest is untimely. Our Bid Protest Regulations require that protests based upon alleged solicitation improprieties be protested prior to bid opening to be considered timely filed. 4 C.F.R. § 21.2(a)(1) (1990); Perdomo and Sons, Inc., B-234614, Apr. 3, 1989, 89-1 CPD ¶ 346. Since the Lab catalog numbers were listed in the IFB, this portion of Allentown's protest, filed after award, is untimely.

The protest is denied in part and dismissed in part.

  
James F. Hinchman  
General Counsel