G. Ruppert

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: CryoMed

File: B-241605

Date: February 22, 1991

Cass Schumann for the protester.
Millard F. Pippin, Department of the Air Force, for the agency.
John Brothers, for Custom BioGenic Systems, an interested party.
George Ruppert, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that awardee did not demonstrate in its proposal that its offered "equal" bone marrow transplant system met requirements in salient characteristics for maximum size, minimum capacity and automatic self-diagnostic capability is denied where agency determined that discrepancies were minor and immaterial and there was no evidence that protesting brand name manufacturer was prejudiced by agency's waiver of the requirements.

DECISION

CryoMed protests the award of a contract to Custom BioGenic Systems, under Air Force request for proposals (RFP) No. F33601-90-R-0137, issued on a brand name or equal basis for a bone marrow transplant system. CryoMed contends that Custom BioGenic's proposed "equal" system failed to meet certain of the salient characteristics of the brand name system listed in the solicitation and that, therefore, the proposal should have been rejected as technically unacceptable.

We deny the protest.

The solicitation specified as the brand name item a CryoMed Model 1010 bone marrow transplant system for the freezing and storage of bone marrow in liquid nitrogen. The RFP included numerous detailed salient characteristics to be used in the evaluation of proposals for brand name or equal bone marrow transplant systems. After receiving the initial proposals

submitted by CryoMed and Custom BioGenic in response to the solicitation, the agency amended the RFP to clarify its requirements and requested best and final offers (BAFO). Custom BioGenic, offering an equal system, submitted the low-priced BAFO, at $24,294; CryoMed offered the brand name system at $30,372.50. Both proposals were determined to be technically acceptable and award therefore was made to Custom BioGenic as the low, technically acceptable and responsible offeror. CryoMed thereupon filed this protest.

CryoMed contends that the system offered by Custom BioGenic does not meet five of the specified salient characteristics, including requirements for: (1) five pre-set freeze programs; (2) a security code to control access to the unit; (3) an automatic self-test capability to be activated upon the powering up of the unit; (4) maximum external dimensions of 34 inches in width, 39 inches in depth, and 40-1/2 inches in height; and (5) a storage capacity of 448 bags of bone marrow.

Generally, when a brand name or equal purchase description is used, it is incumbent upon an offeror proposing to furnish an equal product to establish that its product will meet the specified salient characteristics of the brand name product. The E.A. Kinsey Co., B-211832, July 11, 1983, 83-2 CPD ¶ 75. Where a solicitation sets forth in very specific terms the design features, such as size or weight, the equal product generally must meet that requirement precisely. Cohu, Inc., B-199551, Mar. 18, 1981, 81-1 CPD ¶ 207. In ascertaining if an offeror provides sufficient information with its offer to determine the acceptability of the offeror's product as equal, the agency enjoys a degree of discretion which we will not disturb absent a showing that the determination is unreasonable. See Philips Medical Sys. N. Am. Co., B-237598.2; B-237599.2, Apr. 17, 1990, 90-1 CPD ¶ 395.

We find the award to Custom BioGenic legally unobjectionable. First, with respect to the requirement for five pre-set freeze programs, Custom BioGenic's proposal indicated that its freezing system has "20 programs." CryoMed makes much of the absence of an indication that the programs are pre-set, and claims that the awardee's system in fact is merely programmable by the user. However, we think a statement that a system includes 20 programs can reasonably be read as an assertion that the system includes programs that already have been entered into the system, thus evidencing compliance with the five-program requirement. There was nothing before the contracting officer indicating otherwise. (Although not determinative, we note that Custom BioGenic, in connection with this protest, has definitively represented that its system in fact includes five pre-set freeze programs.)

Likewise, while CryoMed contends that Custom BioGenic's security system, unlike its own, does not require a three-digit security code to access system memory and to program, run or terminate the operation of the system, Custom BioGenic expressly stated in its proposal that it was offering a system in which the programs, and thus the system, could be activated only by a security code. (Custom BioGenic has subsequently indicated that a security key is also required for access.) Again, as there was nothing available to the contracting officer indicating otherwise, Custom BioGenic thereby adequately offered a system satisfying the security code requirement in the salient characteristics.

With respect to the remaining areas in dispute, Custom BioGenic's proposal did in fact deviate from the strict terms of the salient characteristics. Specifically, the salient characteristics established a limit on the size of the system of 34 inches in width, 39 inches in depth and 40-1/2 inches in height, but Custom BioGenic's offered system measures 36-3/4 inches wide, 39 inches deep and 42-1/2 inches high. Likewise, Custom BioGenic indicated in its proposal that the offered system consisted of only 380 canisters for the storage of bags containing bone marrow, rather than the required storage capacity for 448 bags. Further, Custom BioGenic's proposal did not clearly establish that it met the requirement for an automatic self-test procedure to be activated upon the powering up of the system.

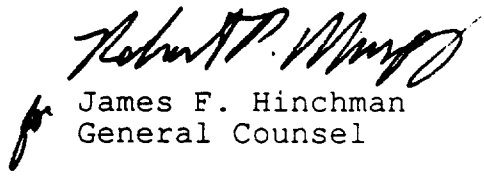
The Air Force reports that any deviations with respect to Custom BioGenic's system will not affect its intended use, and that, moreover, the clarifications furnished by Custom BioGenic in connection with the protest establish compliance with all material aspects of the RFP requirements. Custom BioGenic states that its proposed system in fact provides for the automatic initiation of a self-test program upon powering-up. Custom BioGenic asserts that for the same contract price its system can be packaged in a smaller cabinet only 1/2 inch wider and 1/2 inch higher than specified in the salient characteristics. The Air Force maintains that any remaining difference in dimensions is immaterial, since even Custom BioGenic's system as originally packaged could easily fit through the oversized doors at the hospital where it will be used. Further, Custom BioGenic has stated that the system it proposed in fact stores 432 bone marrow bags, only slightly fewer than the required 448, and can be modified at no extra charge to store 540 bags, 92 more than required under the salient characteristics.

To the extent the awardee's product does not meet the stated salient characteristics but nonetheless meets the agency's needs, it is obvious that the agency's needs were overstated. Where there is a likelihood that full and open competition has

been significantly compromised by an improperly restrictive solicitation, our Office does not require a showing of specific prejudice to the protester before it will sustain a protest against the improper relaxation of the solicitation requirements for the benefit of one offeror. See ManTech Advanced Sys. Int'l, Inc., B-240136, Oct. 26, 1990, 90-2 CPD ¶ 336. Otherwise, an awardee's deviation from RFP specifications warrants sustaining a protest only if there is resulting prejudice to the protester, e.g., if the protester would have altered its proposal to its competitive advantage had it been given the opportunity to respond to altered requirements. See Astro-Med, Inc.--Recon., B-232131.2, Dec. 1, 1988, 88-2 CPD ¶ 545; see generally Federal Computer Corp., B-239432, Aug. 29, 1990, 90-2 CPD ¶ 175. We will resolve any doubts concerning the prejudicial effect of the agency's action in favor of the protester; the reasonable possibility of prejudice is a sufficient basis to sustain the protest. See Logitek, Inc.--Recon., B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401.

In this case, there is no indication that any potential offerors may have been deterred from competing by the salient characteristics at issue here. Nor is there any indication that Custom BioGenic's lower price resulted from the relaxation of the salient characteristics. CryoMed has not asserted, and the record does not otherwise indicate, that it would have altered its proposal of its own brand name item had it been notified of the relaxation of the salient characteristics. CryoMed argues only that Custom BioGenic's proposal should have been eliminated from consideration. In these circumstance, we find no basis for concluding that the Air Force's waiver of the requirements in question resulted in prejudice.

The protest is denied.



for James F. Hinchman
General Counsel