

De George



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tri Tool, Inc.

File: B-241703.2

Date: March 11, 1991

Gary C. Hoffman, Esq., Weintraub, Genshlea, Hardy, Erich & Brown, for the protester.
L. Walker Van Antwerp III, Esq., for Protem Corporation, an interested party.
Douglas P. Larsen, Jr., Esq., Department of the Navy, for the agency.
Steven W. DeGeorge, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under brand name or equal procurement for pipe severers and bevelers, award to firm offering modified "off-the-shelf" equal products is improper where agency determined equivalence to the brand name products based upon a blanket offer of compliance with salient characteristics and information in proposal does not otherwise show that item meets all of the salient characteristics.

DECISION

Tri Tool, Inc. protests the award of a contract to Protem Corporation under request for proposals (RFP) No. N00406-90-R-0524, issued by the Department of the Navy, Naval Supply Center, Puget Sound, for five pipe severers and bevelers. Tri Tool contends that the "off-the-shelf" items proposed by Protem fail to meet certain mandatory salient requirements of the solicitation.^{1/}

We sustain the protest.

^{1/} The protest as initially filed raised several other grounds but since we have sustained the protest on the primary ground and since the protester has not pursued the others in its comments on the agency's protest report, we see no reason to rule on them.

056227 / 14338,2

The RFP was issued on March 16, 1990, soliciting offers for five pipe severers and bevelers on a "brand name or equal" basis. Tri Tool products were identified as the brand names for each of the items solicited. A number of salient characteristics of the Tri Tool products were listed in the solicitation as mandatory requirements. The RFP advised offerors that the determination as to equality of an offered "equal product" would be based "on information furnished by the offeror or identified in his proposal, as well as other information reasonably available to the purchasing activity." The RFP also called for the submission of all descriptive materials necessary for the agency to determine whether a product offered met the salient requirements and to establish exactly what the government would be binding itself to purchase by making an award. If an offeror were to propose a product to be modified so as to make it conform, the RFP further required a clear description of such proposed modification in the proposal, as well as the submission of clearly marked descriptive material to show the modification. Award was to be made to the offeror submitting the lowest-priced, technically acceptable proposal.

Three proposals were received in response to the solicitation. An initial technical evaluation was conducted and, according to the agency's report, only Tri Tool's proposal was considered acceptable as submitted. Protem's initial proposal of "equal products" was considered unacceptable for its failure to conform to all of the RFP's salient requirements. On July 26, the contracting officer wrote to Protem and notified the firm of the technical "deficiencies" found in its proposal. As requested, Protem responded to the contracting officer by letter dated July 30, with revisions to its technical proposal. A second technical evaluation was thereafter conducted by the agency and it was determined that Protem's proposal remained unacceptable for failure still to comply with a number of the RFP's salient requirements. On September 10, the contracting officer issued letters to all three offerors requesting best and final offers (BAFO). The letter to Protem identified the salient requirements which were determined still not met, and advised the firm that it was required to "complete/correct" its proposal and certify that it meets all the specifications before its offer could be considered acceptable.

BAFOs were submitted by each of the offerors and a final technical evaluation was conducted. According to the agency's report, this evaluation resulted in a determination that Protem's proposal was acceptable based upon the firm's statement in its BAFO "that they would meet or exceed our specifications." The contracting officer made award to Protem as the lowest priced, technically acceptable offeror. Tri Tool was second low.

The protester contends that the decision to make the award to Protem was improper because it proposed "off-the-shelf" items which do not meet the following salient requirements: item 0002 (beveling tool) - "right angle feed knob"; and items 0001, 0003 and 0005 (low profile clamshell) - "easily adjustable precision bearing surfaces." Tri Tool argues that Protem's proposal should have been excluded as technically unacceptable and that it should have received the award.

The Navy responds that since Protem certified that its products would meet the RFP's salient requirements, the contracting officer had a reasonable basis upon which to conclude that the proposal was acceptable.2/

In determining whether a particular item meets the solicitation's technical requirements which are set forth as salient characteristics, a contracting agency enjoys a reasonable degree of discretion. Tri Tool, Inc., B-229932, Mar. 25, 1988, 88-1 CPD ¶ 310. However, based on our examination of the record in this case, including the proposal and descriptive material submitted by Protem, we find the Navy's determination that Protem's proposal was technically acceptable is unreasonable.3/

2/ As a preliminary matter, the Navy also argues that the protest should be summarily dismissed for lack of a detailed statement of factual grounds and a request for relief as required under our Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4) and (6) and 21.1(e). We disagree. In our view, the protest was sufficiently detailed, at least as far as the alleged failure of the awardee to meet the salient characteristics is concerned, and we therefore do reach the merits.

3/ Protem's initial proposal did not specify that the proposed beveling tool includes a right angle feed knob as required by the RFP. This nonconformity was one of the "deficiencies" brought to Protem's attention by the contracting officer after the receipt of initial proposals. Protem subsequently submitted revisions to its proposal which show that a right angle feed was an option on the model proposed and appears to include the right angle feed in its amended offer dated July 30. Nevertheless, the agency, in its BAFO request, stated to Protem that its machine did not offer the right angle feed. In response, the awardee in essence resubmitted its July 30 proposal with a certification that its machine will meet all of the RFP's specifications. According to the agency evaluator, "Protem's proposed item 0002 does not have a right angle feed," but the machine was considered acceptable

(continued...)

Protem's compliance with the salient requirement for adjustable precision bearing surfaces on the proposed low-profile clamshell was determined based solely upon the firm's BAFO certification that it would meet or exceed the RFP's specifications. In this regard, the technical evaluator for the procurement, in an affidavit submitted with the agency's report, states that while Protem's offered clamshell does not have adjustable bearings, the proposal was originally found acceptable because of a conclusion that adjustments would actually be unnecessary. The evaluator further asserts, however, that in subsequently checking with shop personnel it became apparent that adjustability was in fact necessary and that, in retrospect, Protem should therefore have been determined unacceptable in this area. In the Navy's view, however, this is overcome by the fact of Protem's certification in its BAFO.

In a "brand name or equal" procurement such as this one, an offeror has the obligation to demonstrate the acceptability of an alternate product. Peck Equip. Co., B-227135, July 13, 1987, 87-2 CPD ¶ 40. This obligation was expressly communicated here by the terms of the solicitation which instructed offerors to submit all descriptive material necessary for the agency to determine whether offered products met the RFP's salient requirements. Protem did not fulfill this obligation. Our review of the record confirms the Navy's own conclusion, admitted in its report, that at least with respect to the requirement for adjustable precision bearing surfaces, Protem's proposal, neither as originally submitted nor as revised, demonstrated compliance with the RFP salient requirements at issue in this case. Although Protem's BAFO certified that its items would meet or exceed all of the RFP's specifications, we do not believe that the certification was sufficient to demonstrate equivalence or establish compliance with salient requirements where there was nothing at all in the literature submitted by Protem that showed the models it offered had the required adjustable bearing surfaces. See Greco Sys., B-237424, Feb. 15, 1990, 90-1 CPD ¶ 192.

Finally, the fact that Protem may have offered modified "off-the-shelf" products, for which descriptive literature did not exist, does not change our conclusion. The RFP explicitly

3/ (...continued)

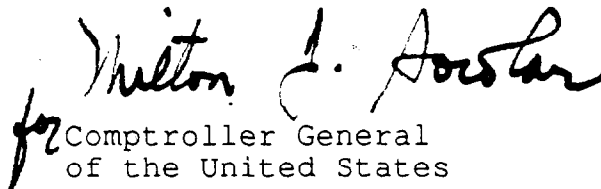
based on the certification in Protem's BAFO. There is nothing in the record which shows that the right angle feed option in the July 30 offer was considered by the agency. Since it is apparent that Protem's offer met this requirement, we do not pursue this issue further.

stated that if modified products were to be offered, clearly marked descriptive literature showing the proposed modification was required to be submitted. Protem's blanket offer of compliance cannot substitute for this express requirement.

We conclude, therefore, that the Navy had insufficient basis upon which to determine Protem's compliance. Where, as here, an offeror fails to demonstrate compliance with all salient requirements, the offer is not acceptable. See Calculers, Inc., B-234074.2, June 6, 1989, 89-1 CPD ¶ 529. In fact, we have been informed by the agency that the awardee's first deliveries were not compliant with the RFP's requirement. The agency has received a second delivery purportedly in compliance with all requirements.

The protest is sustained.

Since delivery has occurred, a recommendation for corrective action is not feasible. We do find, however, that Tri Tool is entitled to be reimbursed its protest costs, including reasonable attorneys' fees, as well as its proposal preparation costs. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1990).


for Comptroller General
of the United States