

Cunningham

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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sharp Electronics Corporation

File: B-242302

Date: April 15, 1991

Stephen L. Bachstetter for the protester.
Herbert F. Kelly, Jr., Esq., Department of the Army, for the agency.
James M. Cunningham, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

BIGGEST

1. Oral advice about solicitation requirements generally is not binding, and a bidder relies on such advice at its own risk.
2. Bid which provided for an "equal" product submitted under brand name or equal procurement for copy machines was properly rejected where the bidder did not submit descriptive data with bid on the equal model, but rather submitted descriptive literature on the product, after award had been made to the next low bidder, which was not in existence prior to bid opening.

DECISION

Sharp Electronics Corporation protests the rejection of its bid under invitation for bids (IFB) No. DAKF49-90-B-0031, issued by the Department of the Army for furnishing, installing, and maintaining copy machines which were specified on a brand name ("MITA" or "SAVIN") "or equal" basis. Sharp contends that its bid of an equal model (Sharp model No. 7850) was improperly rejected as nonresponsive.

We deny the protest.

The Army issued the IFB on July 27, 1990, for the award of a firm, fixed-price contract for a base year with 4 option years on a "cost-per-copy" basis. The IFB called for the contractor to furnish all necessary copier services and supplies (except paper), including copy machines capable of varying production rates. The IFB included a "brand name or equal" clause which informed prospective bidders that bids

offering "equal" copy machines would be considered for award if the products were clearly identified and were determined to meet the brand name products' salient characteristics, which were listed in detail in the IFB. The brand name or equal clause also provided that the Army would determine the equality of equal products on the basis of information furnished by the bidders; therefore, bidders were required to furnish, as part of their bids, all descriptive materials ("such as cuts, illustrations, drawings, or other information") necessary for the contracting activity to: (i) determine whether the product met the salient characteristics of the IFB; and (ii) establish exactly what the bidder proposed to furnish and what the government would be binding itself to acquire by making award. The clause also cautioned the bidders that the agency was not responsible for locating or securing any information which was not identified in the bid and reasonably available to the procuring activity.

Ten bids, including bids from Sharp and Canon U.S.A., Inc., were received by bid opening on October 24, 1990. For item No. 0001A "(MITA DC-1656 or SAVIN 7020)" Sharp, the apparent low bidder, specified its equal model No. SF-7850. However, the associated descriptive material which Sharp submitted with its bid related to Sharp model No. SF-7750. The Army was unable to obtain any relevant descriptive material on the Sharp model No. 7850 specified in the bid, and on November 30, rejected Sharp's apparent low bid as nonresponsive for failing to establish compliance with the required salient characteristics. The Army awarded to Canon, the next low bidder for this item, on the same day. On December 3, after the award had been made, Sharp submitted to the procuring activity descriptive material concerning its model No. 7850 in the form of a brochure which included a "Printed in U.S.A." date of "December 1990."

Sharp asserts that during the bidding process it was in the process of shifting over from its model No. 7750 to the model No. 7850 and that since Sharp initially did not have appropriate literature for its model No. 7850, it bid the model No. 7850 as the most current model substitute for the model No. 7750. Sharp further states that it bid the model No. 7850 based on advice allegedly given by the agency at the pre-bid conference to the effect that if a bidder's product was discontinued during the bidding process, the agency would accept the bidder's most current model. Sharp enclosed the brochure from the model No. 7750 with its bid, which Sharp asserts establishes compliance with the requisite salient characteristics, and furnished descriptive literature, as noted above, on its model No. 7850 on December 3, 1990. Under these circumstances, Sharp insists it was entitled to the award.

As to Sharp's allegation that the agency orally advised it to, in effect, disregard the IFB requirement for the submission of descriptive material on the actual model bid, paragraph L, 19 of the IFB specifically provides that "oral explanations . . . will not be binding." Further, this paragraph provides that any information given a prospective bidder concerning the IFB will be furnished promptly to all other prospective bidders as an IFB amendment. The Army's memorandum for record of the pre-bid conference for this IFB, which was furnished to all bidders before bid opening, does not indicate that the Army stated that a bidder of an equal new model derived from a discontinued model properly could bid without descriptive literature for the current model; moreover, none of the IFB amendments incorporates this alleged advice.

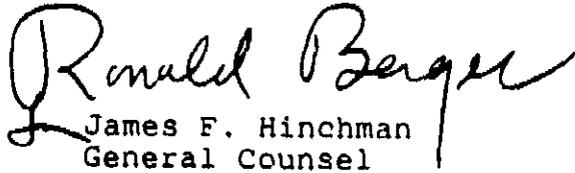
While, in our view, the alleged oral advice does not mean that a current replacement model with differing features may simply be substituted without literature establishing its compliance with the IFB's salient characteristics, in any event, oral advice about IFB requirements generally is not binding, and a bidder relies on such advice at its own risk. General Welding, Inc., B-236189, Dec. 8, 1989, 89-2 CPD ¶ 532. Consequently, the alleged Army advice does not provide any basis to render acceptable Sharp's submission of a bid based on its model No. 7850 for item No. 0001A, with descriptive material concerning only its model No. 7750.

To be responsive to a brand name or equal solicitation, bids offering equal products must conform to the salient characteristics listed in the solicitation. A bidder must submit with its bid sufficient literature to permit the contracting agency to assess whether the equal product meets all the salient characteristics. See 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. CNC Co., B-239328, July 30, 1990, 90-2 CPD ¶ 86.

Here, Sharp's bid for its model No. 7850, accompanied only by literature for the predecessor model No. 7750, did not demonstrate that the offered equal item met all of the salient characteristics specified in the IFB. The model No. 7850 brochure submitted by Sharp after bid opening, which was not in existence at the time of bid opening, may not properly be considered by the agency in determining whether the equal

product offered met the salient characteristics. Performance Controls, Inc., B-224432, Oct. 7, 1986, 86-2 CPD ¶ 405; Pure Air Filter Int'l; Thermal Control, Inc., 56 Comp. Gen. 608 (1977), 77-1 CPD ¶ 342. Accordingly, since the acceptability of the equal item was to be determined on the basis of descriptive literature submitted with the bid, and since the material submitted by Sharp did not show conformance of the model offered with the specified salient features, the agency properly rejected the bid as nonresponsive. Joaquin Mfg. Corp., B-228515, Jan. 11, 1988, 88-1 CPD ¶ 15.

The protest is denied.


James F. Hinchman
General Counsel