



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Lappen Auto Supply Company, Inc.

File: B-261475

Date: August 14, 1995

Richard Snyder for the protester.

Caridad Ramos, Esq., and Vera Meza, Esq., Department of the Army, for the agency. M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under a brand name or equal solicitation, protester's bid offering an alternative product as an "equal" was properly rejected as nonresponsive where the descriptive literature furnished with the bid did not show that the offered product met the listed salient requirements.

DECISION

Lappen Auto Supply Company, Inc., protests the rejection of its bid, and the award of a contract to Hennessy Industries, Inc., under invitation for bids (IFB) No. DAAE20-95-B-0062, issued by the Department of the Army on a brand name or equal basis, for 130 heavy duty pneumatic tire changers. The Army rejected Lappen's bid on the basis that it did not clearly establish that Lappen was offering an "equal" product.

We deny the protest.

The solicitation called for unit prices on a brand name or equal basis for the Coats Model H.I.T. 9000 tire changer, manufactured by Hennessy, and contained the brand name or equal clause found at Defense Federal Acquisition Regulation Supplement (DFARS) § 252.210-7000. This provision requires bidders offering an equal product to provide descriptive literature and clearly describe planned modifications needed to make the offered product conform to the solicitation requirements. The descriptive literature must be sufficient to allow the contracting agency to assess whether the claimed equal product meets all of the salient characteristics.

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Initially, the Army made award to Hennessy as the low bidder; Lappen's bid was second low. However, a subsequent review of the contract file revealed that a 6-percent Buy American Act evaluation factor had erroneously been applied to Lappen's bid; without application of this factor Lappen's bid was low. After discovery of the error, Hennessy's contract was terminated and Lappen appeared to be in line for award. However, after reviewing Lappen's bid of the claimed equal product, the Monty 4200, the Army determined that the firm's bid was nonresponsive. The salient characteristics listed in the solicitation included a "220 volt, 20 amp [ampere], 1 phase" power requirement. The Army found that Lappen's bid did not establish that the offered item met the requirement, since Lappen's descriptive literature showed "380 volt, 50 Hz [hertz], 3 phase" as the power specification. Although Lappen's descriptive literature included the phrase "special voltage on request" and its bid included a letter stating that the Monty 4200 "meets or exceeds the required specifications," the agency determined that these statements alone were insufficient to establish compliance with the requirement. The Army's engineering office concluded that the electrical power offered by Lappen was not equal to that required and that conversion of the Monty 4200 to meet the requirement would most likely result in additional cost. The agency then reinstated Hennessy's contract. This protest followed.

Lappen maintains that the agency improperly evaluated its bid as nonresponsive, primarily on the basis that a letter submitted with its bid from Perfect Hofmann, the supplier of its offered product, was sufficient to indicate that the product complies with the salient characteristics. This letter states that the "Monty 4200 truck tire changer meets or exceeds the required specifications of the above reference number [DAAE20-95-0062] as outlined in pages 8A and 8B of the solicitation [i.e., the salient characteristics]" and that "[t]he product brochure provided is our standard version and may not show some technical differences between our standard Monty 4200 and the unit quoted per the specifications." Lappen maintains that it should have been clear from this letter that it was not offering the standard Monty 4200 but, rather, a nonstandard Monty 4200 which complied with all salient requirements, including the power requirement. Lappen concludes that, contrary to the agency's position, no modifications to the offered item were necessary and, therefore, none was described in its bid.

To be responsive to a brand name or equal solicitation, a bid offering an allegedly equal product must contain sufficient descriptive material to permit the contracting officer to assess whether the offered alternative possesses the salient characteristics specified in the solicitation. Interand Corp., 66 Comp. Gen. 181 (1986), 87-1 CPD ¶ 5; PRO/DES, Inc., B-256541, June 30, 1994, 94-1 CPD ¶ 395. If the descriptive literature or other information reasonably available to the agency does not show compliance with all salient characteristics, the bid must be rejected. Id.

Lappen's assertions of compliance with the power requirement notwithstanding, its bid documents did not demonstrate that its offered equal product meets the requirement. Nothing in Lappen's bid or descriptive literature mentioned the IFB's "220 volt, 20 amp, 1 phase," requirement, or indicated that the firm was offering anything different from the "380 volt, 50 Hz, 3 phase" specifications expressly set forth in its literature. Lappen's reliance on the Perfect Hofmann letter is misplaced. This letter does not even reference the power requirement, let alone state or show that the Monty 4200 version offered would satisfy the requirement. Perfect Hofmann's statements that the Monty 4200 "meets or exceeds the required specifications," and that the descriptive literature "may not show some technical differences between [the] standard Monty 4200 and the unit quoted per the specification," were in the nature of blanket statements of compliance; such statements do not satisfy the requirement for a showing in the bid that an equal product in fact meets the salient characteristics. See EFCOM Communication Sys., B-227975, Aug. 7, 1987, 87-2 CPD ¶ 139.

Lappen contends that post-bid opening discussions with the agency cured any responsiveness problems with its bid. Specifically, Lappen maintains that the agency confirmed with Perfect Hofmann after bid opening that the supplier could provide a Monty 4200 which would meet the IFB's power requirement, and that Lappen was offering this compliant version. Even if these discussions were persuasive to the agency, such post-opening discussions cannot be used to establish the responsiveness of a bid. Responsiveness generally must be ascertained from the bid documents themselves, not from clarifications provided by the bidder or its supplier after bid opening; to permit explanations after opening improperly would give the bidder control over the responsiveness of its bid based on information available to the bidder after bid opening. Marco Equip., Inc., et al., 70 Comp. Gen. 219 (1991), 91-1 CPD ¶ 107; PRO/DES, Inc., *supra*.¹

Lappen maintains that the Army improperly rejected its bid as nonresponsive on the basis that conversion of Lappen's item to meet the power requirement would entail additional cost. This argument is without merit. While the Army did find that complying with the requirement would increase the cost of Lappen's offered item, this finding in no way diminished the effect of its determinative finding that the bid did not establish compliance with the requirement; it was on this basis that the Army properly rejected the bid.

¹Descriptive material submitted after bid opening may be considered where the material was commercially available before bid opening; there is no indication that Lappen submitted such material. Monitronics, B-228219, Nov. 30, 1987, 87-2 CPD ¶ 527; see also Alternate Power and Energy Corp., B-228746, Nov. 3, 1987, 87-2 CPD ¶ 440.

Lappen further maintains that Hennessy's bid was defective. Hennessy's bid also was accompanied by descriptive literature, and Lappen asserts that, since Hennessy's descriptive literature listed three different power specifications, the agency should have found that there was doubt as to the bid's adherence to the electrical power requirement. In this regard, Hennessy's bid, which specified the brand name item, the Coats 9000, manufactured by Hennessy, included literature setting forth the power specifications as follows:

"220 Volts/60 Hz Single Phase
2 HP/20 A
220 Volts/60 Hz Three Phase
2 HP/10 A
110 Volts/60 Hz Single Phase
2 HP/30 A"

Although Hennessy, as an offeror of the brand name item, was not required to submit descriptive literature, its unsolicited literature could not be disregarded to the extent that it clearly qualified the bid by describing an item Hennessy intended to furnish that did not satisfy a specified salient characteristic. This would render the bid nonresponsive. Tektronix, Inc., B-225769, June 8, 1987, '87-1 CPD ¶ 580.

The three different power specification references did not make Hennessy's bid unclear so as to render it nonresponsive. There is no basis for concluding that the listing of three different power specifications was intended for any purpose other than to indicate that the item could be furnished meeting any of the three; indeed, it is difficult to conceive of any other purpose for including such alternative specifications in commercial literature. Thus, in the absence of any indication that Hennessy was reserving for itself the right to determine which power specification it would meet, and since one of the three specifications met the IFB requirement, Hennessy's bid was responsive. See Caprock Vermeer Equip., Inc., B-217088, Sept. 3, 1985, 85-2 CPD ¶ 259; Toms River Plumbing Supply Co., Inc., B-192909, Jan. 25, 1979, '79-1 CPD ¶ 52.²

The protest is denied.

/s/ Ronald Berger

²Lappen raises additional arguments, all of which are clearly without merit. For example, Lappen suggests that its bid was not evaluated by appropriate personnel; the record clearly indicates that its bid was in fact evaluated by an engineer, as were the other bids. Lappen also argues that the agency improperly included a 6-percent Buy American Act evaluation factor in its bid. As discussed above, the agency corrected this error.