Scott Part II

01524

DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-187101 DATE: February 11, 1977

MATTER OF: Parkson Corporation

DIGEST:

1. Where brand name or equal purchase description is used in request for proposals, technical specification requirements constitute salient characteristics of equipment to be purchased and must be complied with by offerors.

2. Agency's acceptance of proposal offering equipment which deviates from specifications, without first amending solicitation and providing opportunity for all offerors to compete on equal basis, is improper. However, termination of contract is not recommended in light of circumstances suggesting that protester was not unduly prejudiced by procurement deficiencies.

The Parkson Corporation (Parkson) protests the award of a contract by the Bureau of Mines, Department of the Interior (Interior), to the Pielkenroad Separator Company (Pielkenroad) under request for proposals (RFP) S0166141. The protester alleges that the award was improper because Pielkenroad did not offer to furnish equipment meeting the specifications.

The RFP solicited offers on six items of coal slurry pumping equipment. Item 6, Clarification Equipment, was described as "Parkson Corporation Lamella Thickener Model 2500/45 or equal as approved by the Government." Two proposals were received for Item 6, one from Parkson and one from Pielkenroad. Both offers were considered to be technically acceptable, although neither conformed to the specifications. The contract was awarded to Pielkenroad on the basis of its lower price.

Both offers deviated in several respects from the specifications. Parkson's most significant deviation was the elimination of the flocculator, a component of its Model 2500/45. The record indicates that while the RFP was not amended to reflect the acceptability of the equipment without a flocculator, Pielkenroad was directly informed of this change and was instructed by the contracting officer to remove the flocculator from its proposed equipment. Other deviations reflecting peculiarities of the

Parkson equipment were not communicated to Pielkenroad. With regard to Pielkenroad's deviations, Interior states:

> "Like those proposed by Parkson, these deviations reflected peculiarities in the particular manufacturer's equipment and were determined to be technically acceptable. Pielkenroad equipment uses a slightly different angle of inclination for the plates, uses a sludge rake in place of a vibrator, and substitutes a system of headers and timers for the rapid mix tank."

Parkson contends that the specifications Pielkenroad failed to meet constitute salient characteristics of the specified brand name item which had to be strictly met and that Pielkenroad's failure to adhere to them rendered its proposal unacceptable and the resulting contract void and a legal nullity. Parkson also contends that Interior's willingness to accept Pielkenroad's proposed equipment without amending the specifications precluded it from competing on an equal basis and prejudiced its competitive position. In this regard, Parkson states that if the RFP had been amended to reflect the Pielkenroad deviations, it would have offered "much cheaper" equipment.

Interior concedes that a number of deviations from the specifications were allowed to each offeror without amendment of the RFP, but states that the deviations were minor and did not affect compliance with the Government's performance requirements. Interior further asserts that both it and the two offerors responding to the RFP regarded the specifications as guidelines rather than rigid criteria to be absolutely met, stating:

> "Both the protestant and the successful offeror apparently agreed with the Government's interpretation of its requirements since both submitted beneficial changes to or ignored certain guidelines set forth in the specification. The government in turn evaluated the responsiveness of the offers based on overall performance of the finished product and not on individual characteristics."

Interior also states that its handling of this procurement did not result in prejudice to either Pielkenroad or Parkson because each offeror was proposing its own equipment and neither

would have changed its proposal had the RFP been amended. In this connection, Interior reports that its consulting engineering firm, which drafted the specifications, contacted Parkson after the protest was filed to determine what kind of cheaper unit Parkson could have proposed. According to Interior, Parkson indicates that:

> " * * * It shows that * * * /its/ 'cheaper unit' would have been the basic Lamella unit with the rapid mixer and vibrator deleted. Pielkenroad's deviations, from the specifications were substitutions for this equipment, not deletions. * * * /I/t is clear from both the technical opinion of * * * /the consulting engineer/ and Parkson's own recommendations prior to issuance of the RFP that a Lamella unit with these items deleted will not perform satisfactorily. Thus, Parkson has itself verified that it could have proposed no acceptable modifications to its equipment in response to an RFP amendment reflecting the Pielkenroad deviations. The agency believes that this alone amply illustrates the speciousness of Parkson's argument that it was prejudiced-it can propose no reasonable modifications of its proposal even in the hindsight of a post-award protest."

Accordingly, Interior concludes that "amending the RFP, although technically required * * * would have been a mere formality in this instance."

When a brand name or equal purchase description is used, the solicitation is required to include a listing of salient characteristics of the brand name product to indicate the essential, material needs of the procuring activity. Federal Procurement Regulations (FPR) § 101.307-4(b) (1964 ed.); General Hydraulics Corporation, B-181537, August 30, 1974, 74-2 CPD 133. Here, although the RFP did not include a listing explicitly denominated as "salient characteristics," it did set forth "SPECIFIC TECHNICAL REQUIREMENTS" relating to clarification equipment. We have held, in similar situations, that when such technical requirements set forth "particular features" of the product to be purchased "Such features must be presumed to /be/ * * * material and essential to the needs of the Government"

and must be complied with. See, e.g., Cummins Mid-America, Inc., B-185664, May 26, 1976, 76-1 CPD 343; S. Livingston & Sons, Inc., B-183820, September 24, 1975, 75-2 CPD 179. Furthermore, the RFP itself specified that a proposal offering an "equal" product would be considered for award if the product was determined "to meet fully the salient characteristic requirements listed in the Request for Proposals." Thus, notwithstanding Interior's position that the specifications were intended only as guidelines, we think the specification provisions properly must be regarded as imposing mandatory requirements.

When a contracting agency determines that a proposal which involves a material departure from specified requirements would nonetheless be acceptable, amendment of the RFP is required so that all offerors are afforded an opportunity to compete on an equal basis. Unidynamics/St. Louis, Inc., B-181130, August 19, 1974, 74-2 CPD 107; Annandale Service Company, B-181806, December 5, 1974, 74-2 CPD 313; PRC Computer Center, Inc., 55 Comp. Gen. 60 (1975), 75-2 CPD 35. See also FPR § 1-3.805-1(d), which provides:

> "When, during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase, or otherwise modify the scope of the work or statement of requirements, such change or modification shall be made in writing as an amendment to the request for proposals, and a copy shall be furnished to each prospective contractor."

It is clear that the rules governing competitive negotiated procurement were not followed in this case. Although the two competing offerors on Item 6 both offered to furnish equipment which did not meet the specifications, Interior, apparently because those specifications did not accurately reflect its minimum needs, regarded both deviating proposals as acceptable and accepted one of them without, however, amending the RFP and revising the specification requirements. Also, while Interior, in an apparent attempt to equalize competition in one respect, informed Pielkenroad of one Parkson-proposed specification deviation and allowed Pielkenroad to submit a revised proposal on the basis of a similar deviation, it did not request best and final offers from both offerors or give Parkson any opportunity to submit a revised proposal, in contravention of FPR § 1-3.805-1; see, e.g., National Health Services, Inc., B-186186, June 23, 1976, 76-1 CPD 401. Further, it appears that what Interior actually

wanted was equipment meeting certain performance requirements rather than the design features it set out in the specifications and that in this regard two-step formal advertising, rather than a negotiated procurement with a brand name or equal purchase description, would have been more appropriate. Accordingly, the protest is sustained.

Ordinarily, in light of the procurement deficiencies noted, we would recommend termination of the contract (we do not agree with Parkson that the contract is void ab initio since we do not believe that under the standards established by the Court of Claims and adopted by this Office the contract award was plainly or palpably illegal. See John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963); Warren Brothers Roads Co. v. United States, 355 F. 2d 612 (Ct. Cl. 1965); 52 Comp. Gen. 215 (1972)). However, in this case there appears to be substantial doubt that in fact Parkson was unduly prejudiced by those deficiencies. As indicated above, Interior states that Parkson could not have furnished technically acceptable cheaper equipment. In addition, Interior also states that even if Parkson could have come up with less expensive equipment, it is unlikely that Parkson would have become the low offeror in view of the price spread between Parkson and Pielkenroad (Parkson's price was approximately 50 percent higher than Pielkenroad's) and the relatively insignificant costs associated with Pielkenroad's deviations. Moreover, we are advised that Pielkenroad has incurred expenses totalling more than 75 percent of the contract price in performing the contract since the award date. Under these circumstances, we do not think it would be in the best interest of the Government to disturb the award. We are, however, recommending to the Secretary of the Interior that he take appropriate action to insure that future procurements will not be marred by the deficiencies noted in this procurement.

Deputy Comptroller General
of the United States