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J. Cohen
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DECISION



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

FILE: B-1903-2

DATE: February 15, 1978

MATTER OF: Schottel of America, Inc.

DIGEST:

1. Protest that RFP for "brand name or equal" item failed to adequately describe brand name's characteristics will not be considered on merits, since it was not filed prior to closing date for receipt of initial proposals.
2. RFP for "brand name or equal" propelling unit required that offerors proposing to furnish "equal" submit sufficient descriptive literature to enable contracting agency to determine whether item meets brand name's salient characteristics and exactly what is being offered. Contracting agency's determination that literature submitted, which related to product similar to but with number of features different from those of offered "equal," was inadequate and that proposal was therefore unacceptable was not unreasonable.
3. Offer of blanket compliance with salient characteristics of brand name product is not acceptable substitute for required descriptive data on "equal" product.
4. Low offeror under RFP for "brand name or equal" item did not submit with initial offer required descriptive data on "equal" and submitted inadequate descriptive data with best and final offer. Award to another offeror without affording low offeror further opportunity to submit data was proper.

Request for proposals (RFP) No. DACW27-77-R-0044 was issued by the Louisville District of the Corps of Engineers (Corps) on September 14, 1977, as a sole-source procurement of six propelling units from Murray & Tregurtha Division, Mathewson Corporation (M&T). The units were described on the Schedule as "Propelling units Murray & Tregurtha Harbor Master Model OA 31-(NL) or equal." Shortly after issuance, the Corps learned that Schottel of America, Inc. (Schottel),

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had entered the field and, therefore amended the item description to read "Propelling units Murrery & Tregurtha 'Harbor Master, H Design, Series 3, 100 h.p. at 1800 r.p.m.,' or equal." In addition, the quantity was reduced to three. Proposals were due on September 27, and award was to be made to the low offeror.

Paragraph 10 on page C-6 of the RFP, entitled "Brand Name or Equal," required, in accordance with Armed Services Procurement Regulation (ASPR) §§ 1-1206 and 7-2003.10 (1976 ed.), that an offered "equal" product fully meet the salient characteristics of the brand name product. It also provided:

"c. (1) * * * The evaluation of the bids and the determination as to equality of the product offered shall be the responsibility of the Government and will be based on information furnished by the bidder or identified in his bid, as well as other information, reasonably available to the purchasing activity. CAUTION TO BIDDERS. The purchasing activity is not responsible for locating or securing any information which is not identified in the bid and reasonably available to the purchasing activity. Accordingly, to insure that sufficient information is available, the bidder must furnish as a part of his bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the salient characteristics requirements of the 'Request for Quotations' and (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include specific references to information previously furnished or to information otherwise available to the purchasing activity."

Schottel's proposal was the lowest in price of the three received. Although Schottel proposed on an "or equal"

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basis, offering its own model, it did not include with its proposal descriptive material as required by paragraph 10c.(1), quoted above.

Best and final offers were requested on September 28, at which time Schottel was advised that it had not complied with paragraph 10c.(1). With its best and final offer, submitted on the following day, Schottel included drawings and brochures of a foreign-made unit similar to the Schottel item but which did not include certain of the Schottel item's features. The material showed that the foreign-made unit differed from the M&T item in a number of respects.

The Corps states that on September 29 the Schottel representative who delivered its best and final offer advised that Schottel:

" * * * would supply any item needed for meeting the solicitation requirements, but did not have brochures, cuts, etc., to verify the bid. He stated further that if awarded a contract, he would return after award to work out specific technical details to the Corps' satisfaction."

The Corps also states that at that time the Schottel representative indicated that the only information he had concerning the M&T item was in the "fly sheet" for the item, which the Corps contends gave only dimensions, not technical information. In addition, the Corps states that the representative was informed at that time that the Government would have to modify its boats to use the Schottel model, since it required side mountings and, after noting that the Schottel propeller was smaller in diameter than the M&T one, the representative:

" * * * was asked if the smaller propeller would decrease the 'push power' of the unit, which was crucial to meet the '100 HP at 1800 rpm' requirement when maneuvering close to a dam. Mr. Welch [the representative] replied that he did not know what effect a small propeller would have under such circumstances."

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The Schottel proposal was evaluated on September 30 by Corps engineers, who found:

"The drawings provided by Mr. Welch were for a totally foreign made unit, not reflecting requested alignment, proposed engine, proposed engine housing, steering control locations, or hydraulic steering unit, for unit providing power to the propeller through tail section elevation.

"Mr. Welch's proposal was vague, as he stated he could supply any item necessary to meet the H-3 series standard; but he made no commitment to formally define what he would supply to meet said requirement, such as drawings, cuts, illustrations, etc., of any unit previously manufactured.

"Therefore, it is my determination that the bid from Schottel of America, Inc., is non-responsive, by failing to submit accurate drawings and descriptions sufficient for the government to determine that the product offered meets our requirements."

Also on September 30 and after best and finals had been submitted, Schottel notified the Corps that it had a design unit which could be separately mounted, and requested that it be allowed to submit descriptive drawings on that unit the following week. The Corps denied the request and awarded the contract to the second low offeror on that date.

Schottel filed a protest in our Office on October 4. Schottel contends that the RFP's description of the M&T propelling unit was insufficient; that Schottel's product in fact met the RFP description, and the data submitted on September 29 so illustrated; that, in any case, Schottel "assured agency officials that Schottel's unit would meet the narrowly-drawn horsepower and rpm ratings listed in the solicitation;" and that award was made without fair consideration of Schottel's offer because the contracting agency "wanted to spend every penny appropriated to it prior to the lapse of the fiscal year [September 30]."

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Concerning the adequacy of the RFP's description of the propelling units required, section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1977), requires that protests based upon alleged improprieties in an RFP be filed prior to the closing date for receipt of initial proposals. The protest on that issue, filed after September 27, when initial proposals were due, is therefore untimely and will not be considered on its merits.

In regard to whether Schottel's product was acceptable on the basis of the descriptive literature actually submitted and the assurance of the firm's representative, where an RFP solicits offers on a brand name or equal basis, the determination whether an equal is acceptable must be made in view of the salient characteristics of the brand name which are necessary to satisfy the Government's needs. Those characteristics must be listed in the solicitation. ASPR § 1-1206.4(a) (1976 ed.) The failure of a product to conform in aspects not listed affords no basis for its rejection. OMNI-SPECTRA, Inc., B-184341, April 14, 1976, 76-1 CPD 251. Here, although no salient characteristics were explicitly listed, clearly the requirement in the item description "100 h.p. at 1800 r.p.m." was a mandatory feature. See Parkson Corporation, B-187101, February 11, 1977, 77-1 CPD 103.

The Corps' evaluation of Schottel's proposal indicates a concern with the lack of descriptive literature to show that Schottel's product could meet a number of requirements not listed in the RFP. However, it is clear that the lack of material prevented the Corps from being able to determine both whether the cited performance characteristic would be met, as well as exactly what Schottel proposed to furnish and the Government would be binding itself to purchase if award were made to Schottel. We believe that, in view of paragraph 10c.(1) of the RFP, the Corps' position that Schottel's offer was thereby rendered unacceptable was not unreasonable and will not, therefore, be overturned by our Office. See Racon, Inc., B-186864, September 29, 1976, 76-2 CPD 295.

Further, Schottel's assurance that its product would meet the Government's requirements cannot serve to satisfy the descriptive literature requirement of the brand name

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or equal clause. See 50 Comp. Gen. 193, 201 (1970). It is well settled that an offer of blanket compliance with the salient characteristics listed in a solicitation is not an acceptable substitute for required descriptive data on an "equal" product. McKenna Surgical Supply, Inc., B-186895, April 15, 1977, 77-1 CPD 261.

Concerning Schottel's last point, the Corps states:

"At no time did the contracting officer state that Schottel's bid would not be considered because award was required prior to the end of the fiscal year. Funds for this procurement were available regardless of the fiscal year in which award was to be made."

Although Schottel disputes that statement, the above discussion indicates that Schottel's proposal was in fact fairly evaluated by Corps engineers. All offerors were on notice by paragraph 10c.(1) that descriptive material concerning an offered "equal" item was necessary for the purposes described therein--it was Schottel's failure to supply adequate descriptive data that rendered its proposal unacceptable, not an incomplete evaluation by the Corps.

In connection with the above, we believe that the Corps' refusal to consider the data proffered by Schottel on September 30 was not improper. Under the circumstances, we consider that the Corps' advice to Schottel on September 28 that it had not complied with paragraph 10c.(1) in its initial offer fulfilled the requirement that meaningful discussions be conducted in a negotiated procurement. See ASPR § 3-805.3(a) (1976 ed.); 53 Comp. Gen. 240, 247 (1973). Thus, once Schottel's best and final offer was received and was still deficient in the same regard, there was no requirement that negotiations be reopened solely to allow Schottel to further revise its proposal. See Bell Aerospace Company; Computer Sciences Corp., 54 Comp. Gen. 352 (1974), 74-2 CPD 248. In any case, and notwithstanding that on September 30 Schottel stated that it did have another design unit with descriptive material, we note that in its protest Schottel admits

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that on September 30 the contracting officer "had literally all the information that there was to have concerning the Schottel unit."

The protest is denied.

R. F. Kilday
Deputy Comptroller General
of the United States