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DECISION



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

FILE: B-192317

DATE: October 23, 1978

MATTER OF: Ohio Medical Products

DIGEST:

Failure of "equal" product offered in low bid to meet one of salient characteristics in "brand name or equal" invitation properly resulted in rejection of bid as nonresponsive.

Invitation for bids No. 600-50-78 was issued by the Long Beach Veterans Administration Hospital for the procurement of anesthesia machines and accessories. Bidders were advised that the machines were "to be [the] American Drager Narkomed Model[s] listed or equal[s] and in accordance with [the] specifications on pages 8 & 9" of the invitation.

The Ohio Medical Products' (Ohio) bid was rejected as nonresponsive to various technical requirements in the invitation. Among other things, it was determined that the Ohio anesthesia ventilator did not have the required maximum inspiratory pressure of 120cm H₂O.

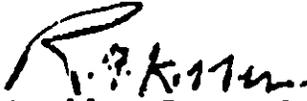
Ohio protests the rejection of its bid on the basis that the action was imprudent fiscally since the Ohio bid price was approximately one-third less than the contract awardee's price for offered products that were in fact "equal" and were incorrectly found to be otherwise. The firm notes that bidders were informed in the invitation that "Information obtained from Drager Catalogs is listed for descriptive purposes only and is not intended to be restrictive." Ohio believes that the agency's interpretation of the technical requirements was restrictive and exhibited a sole-source procurement objective. As regards the inspiratory pressure, in responding to the agency's protest report, Ohio notes that while its ventilator has a maximum inspiratory pressure of approximately 60cm H₂O, a 120cm H₂O pressure is an unusually high requirement for current anesthesia practice. However, Ohio does have the ability

to provide pressures above 60cm H₂O on a special order basis, although some concern is expressed for patient safety in providing driving pressures in excess of 100cm H₂O on ventilators.

When a "brand name or equal" purchase description is used procurement officials are required to include in the solicitation a list of all the salient characteristics of the brand name products so as to indicate the essential needs of the procuring activity. Federal Procurement Regulations § 1-1307-4(b) (1964 ed. amend. 85). Bids offering "equal" products must conform to the salient characteristics listed in order to be regarded as responsive. 49 Comp. Gen. 195 (1969). The fact that the "brand name or equal" clause used here or other language in a solicitation states that the listed characteristics are intended to be descriptive does not permit accepting a bid which deviates from the stated characteristics. Business Equipment Center, Ltd. B-184583, November 6, 1975, 75-2 CPD 284.

We believe that the procurement activity's rejection of the Ohio bid was proper. As admitted by Ohio, its offered product did not provide the 120cm H₂O inspiratory pressure required in the listed salient characteristics. In this respect, the Ohio product was not an "equal" and did not contain a characteristic that the activity wanted. Furthermore, the agency has confirmed the necessity for this characteristic by stating that patients who have chronic lung disease often require high pressures to inflate their lungs. In any event, the Ohio contention that the use of such a pressure could be unsafe (and therefore should not have been a technical requirement) may not be considered by our Office since it was untimely raised after bid opening. 4 C.F.R. § 20.2(b)(1) (1978). To the extent that the agency allegedly interprets other specification requirements in a restrictive manner, Ohio, now aware of the agency's interpretation, is in a position to protest future solicitations containing similar requirements.

In view of the above, the protest is denied.


Deputy Comptroller General
of the United States