



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

B-177519

May 18, 1973

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The Honorable Rogers C. B. Morton
The Secretary of the Interior

Dear Mr. Secretary:

We refer to the letter of January 26, 1973, from the Acting Director of Survey and Review, furnishing a report on the protests of the Hydraprise Corporation against the cancellation after bid opening of National Park Service (NPS), Denver Region, invitation for bids No. DSC-3, and the proposed award to Alandale Construction Co. under revised invitation for bids No. DSC-4. Kendall Sloan Company has also protested against the rejection of its bid under the revised invitation.

The initial invitation, DSC-3, requested that bids on a brand name or equal basis be submitted by August 16, 1972, for furnishing certain marine sanitary facilities. After bids had been opened, it was discovered that the brand name or equal clause required by paragraph 1-1.307-6(e)(2) of the Federal Procurement Regulations (FPR) had been inadvertently eliminated from the Supplemental Provisions of the invitation. In addition, the bid prices received exceeded the amount of funds available for the procurement. Consequently, the contracting officer canceled the invitation and revised the specifications by including the required brand name or equal clause and by deleting certain schedules of work. This was accomplished by the issuance of invitation DSC-4.

Hydraprise protests the cancellation of invitation DSC-3 on the basis that the omission of the brand name or equal clause did not restrict competition and, consequently, it should not have been used as a ground for cancellation. It also believes that if the bid prices submitted were higher than the amount of funds available for the procurement, the contracting officer could have remedied this situation simply by awarding a contract for fewer work schedules.

We cannot take exception to the contracting officer's determination to cancel DSC-3 for the stated reason. As noted in the contracting officer's report, a large percentage of the work is identified by reference to brand name items. When end items or components are identified in a solicitation by brand name or equal descriptions, the brand name or equal clause prescribed in FPR 1-1.307-6 must be included. The clause is necessary because it provides a vehicle for identifying the product a bidder proposes to furnish and insures that the procurement activity

[Protest of DSC-3 Cancellation]

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will receive data sufficient to determine whether nonbrand name items will meet the specified needs of the Government. Since the omission of the brand name or equal provision was a proper reason for canceling invitation DSC-3, we need not consider the additional reason advanced in support of cancellation.

In addition to revised brand name or equal coverage and the deletion of certain work schedules, invitation DSC-4 also contained a requirement for the submission of descriptive literature.

Paragraph 1-03 of the General Requirements imposed the following requirements for the submission of descriptive literature by all bidders:

1-03 CONTRACTORS SUBMITTALS: a. General: Descriptive literature shall be submitted to the Contracting Officer for review and approval covering all materials and equipment to be provided under this contract. Submittals shall be made for the following:

1. Floating Comfort Stations
2. Boat Sanitary Stations
3. Dock Launching and Beaching Dollies
4. Waste Transfer Tank Trailers
5. Gangways
6. Mooring Cable and Fittings
7. Electrical Cable
8. Hoses and Hose Connections

b. Pre-contract award submittals: With reference to Clause 30, REQUIREMENT FOR DESCRIPTIVE LITERATURE, of Form 10-275, one complete set of descriptive literature shall be submitted to the Contracting Officer at or before the time set for opening of bids. This descriptive literature shall include such data as catalogue cuts, general drawings and specifications which will permit evaluation with regard to general overall compliance with the drawings and specifications included as part of the Invitation for Bids.

c. Post-contract award submittals: After award of the contract, detailed submittals shall be made to the Contracting Officer. These submittals shall include catalogue cuts, specification sheets, capacity data sheets, performance curves, manufacturers certified dimensional drawings, general assembly drawings, sub-assembly drawings, details, diagrams and other data as may be required for full evaluation to ensure that all parts will conform fully with the provisions and intent of the drawings and specifications. Submittals shall all be furnished in quadruplicate.

clearly identified, and shall be complete and legible. One copy of each submittal will be returned to the contractor within 14 days, with comments and/or approval. If re-submittals are required, such resubmittals shall be made within 14 days after notification that resubmittal is required. Any manufacture, fabrication, procurement, or assembly accomplished prior to the approval of post-contract award submittals will be at the contractor's risk. One complete set of full size reproducible of the approved shop drawings shall be furnished to the Contracting Officer prior to manufacture, fabrication or procurement.

d. Optional submittal: If at the bidder's option detailed data as required under (c) above is submitted together with or in lieu of the data required under (b) above, the Government reserves the right to evaluate the material for purposes of contract award on the basis of general overall compliance only as set forth in (b) above.

Detailed evaluation will be made only after the award of the contract as specified in (c) above.

Clause 30 of the Supplemental Provisions, "Requirement for Descriptive Literature," referenced in subparagraph b of paragraph 1-03, advised bidders that:

(a) Descriptive literature as specified in this Invitation for Bids must be furnished as a part of the bid and must be received before the time set for opening bids. The literature furnished must be identified to show the item in the bid to which it pertains. The descriptive literature is required to establish, for the purposes of bid evaluation and award, details of the products the bidder proposes to furnish as to (*).

*Contracting officer shall insert significant elements such as design, materials, components, or performance characteristics, or methods of manufacture, construction, assembly, or operation, as appropriate.

(b) Failure of descriptive literature to show that the product offered conforms to the specifications and other requirements, of this Invitation for Bids will require rejection of the bid. Failure to furnish the descriptive literature by the time specified in the Invitation for Bids will require rejection of the bid except that if the material is transmitted by mail and is received late, it may be considered under the provisions for considering late bids, as set forth elsewhere in this Invitation for Bids.

With respect to the submission of brand name or equal items, bidders were advised on page 7 of the Schedule that:

Major components including the floating docks, holding tanks, restroom assemblies, pump out units and service units for the Boat Sanitary Stations and Floating Comfort Stations are specified by brand name or equal. If the offer is based on equal products for these major components, the Manufacturer's name, brand and number shall be inserted in the spaces provided below:

a. Floating Docks - Equal Product:
Manufacturer's Name _____
Brand _____
No. _____

b. Restroom Assemblies - Equal Product
Manufacturer's Name _____
Brand _____
No. _____

c. Holding Tanks - Equal Products
Manufacturer's Name _____
Brand _____
No. _____

d. Pump Out Units and Service Units - Equal Products
Manufacturer's Name _____
Brand _____
No. _____

Unless equal products are indicated for these major components the offer will be considered as offering the specified brand names.

Paragraph 24 of the Supplemental Provisions contained the standard brand name or equal clause prescribed by FTR sec. 1-1.307-6(a)(2). In addition, paragraph SP-06 of the Special Provisions, entitled "Trade Names," advised bidders that:

* * * Equal products for brand name or equal specified major components of the Boat Sanitary Stations and Floating Comfort Stations will be evaluated prior to the award of the contract as specified in Clause No. 24 [of the Supplemental Provisions]
* * * Equal products for all other brand name or equal specified items will be evaluated after the award of the contract.

Four bids were received on the readvertisement. The low bid, an alternate bid of \$184,100 submitted by the Alandale Construction Co., was rejected as nonresponsive based on a review of Alandale's descriptive literature. The second low bid, a bid of \$193,681 submitted by the Kendall Sloan Company, was also rejected because Sloan failed to include sufficient descriptive literature to permit a determination of exactly what was being offered. Alandale's basic bid, in an amount of \$196,369, was the third low bid. The fourth low bid was submitted by the Hydrarise Corporation in the sum of \$204,999. NPS determined that the descriptive literature accompanying the basic bid of Alandale established that the equipment proposed was substantially in compliance with the specifications. The literature accompanying Hydrarise's fourth low bid of \$204,999 was also reviewed and found to be adequate.

Sloan questions the rejection of its bid on the ground that adequate descriptive literature was furnished with its bid. Alternatively, it maintains that if its literature is inadequate, Alandale's literature is also inadequate. Hydrarise, in turn, supports the contracting officer's rejection of Sloan's bid, but questions his determination that Alandale's basic bid was responsive. (The propriety of the rejection of Alandale's alternate bid is not in issue).

In our view, the descriptive literature accompanying both the Sloan and Alandale bids was inadequate to permit a determination whether the bids were responsive to the material requirements of the specifications.

Sloan identified itself as the manufacturer of the major components. In lieu of the model designation, Sloan noted that the items would be furnished in accordance with the invitation drawings and specifications. To satisfy the literature requirements, Sloan simply enclosed with its bid the invitation drawings with a Sloan identification. While Sloan also furnished data of other manufacturers for several minor components, the contracting officer had no alternative but to determine that the descriptive literature submitted was insufficient for determining whether the items offered were in compliance with the specifications. Moreover, Sloan's failure to furnish sufficient literature on its equal product cannot be overcome either by a general promise to furnish items conforming to the specifications or by an offer to supply additional data after bid opening. 50 Comp. Gen. 193, 201-202 (1970).

With respect to Alandale's descriptive literature, we note that the contracting officer's report states that the data submitted with the Alandale bid establishes that the equipment and materials offered by the bidder are "substantially in compliance with the specifications." A memorandum dated November 10, 1972, from the Chief, Plans and Design Services, to the contracting officer, indicates the basis for couching

the determination of adequacy in these terms. In advising the contracting officer that Alandale's literature was adequate, the following comment was made:

The appraisal was made on the basis of general configuration and quality of materials. The contractor will still be required to comply in full with the plans and specifications issued with the invitation for bids.

In our view, the foregoing quite clearly suggests that Alandale's literature was insufficient for purposes of determining exactly what Alandale proposed to furnish and what the Government would be binding itself to purchase. Any doubt we might have on this matter is resolved by an examination of the Alandale bid and descriptive literature.

Alandale identified itself as the manufacturer of equal items for the major components and in response to the request for model numbers, it stated: "Basically per N. P. S. details." The first page of its descriptive literature submission contains the following statement:

The attached brochures, specifications and drawings are intended to show the various products manufactured by Alandale Marine to be modified in size and configuration and furnished under the above solicitation. Those portions that apply specifically to this project are marked.

This submittal is intended to basically describe the products to be furnished. A representative of Alandale is available prior to award to make a more complete presentation including material samples, photographs of installation and details.

Wherever check marks appear in the remainder of Alandale's submission they are either preceded or accompanied by legends stating "Typical Only," or "Typical - Not Applicable."

While we believe that the Alandale and Sloan bids were nonresponsive as a result of their failure to furnish adequate descriptive literature, we also believe that their responses are symptomatic of the deficiencies in invitation DSC-4.

FPR sec. 1-2.202-5(d)(2) provides that when brand name or equal purchase descriptions are used, the requirements of section 1-2.202-5 are met by inserting in the invitation for bids the brand name provision set forth in FPR sec. 1-1.307-6. Since a brand name or equal clause was included, it was unnecessary to add a further requirement for descriptive literature. B-168189(2), April 27, 1970. Indeed, the request for

Descriptive literature appears to overlap, in large part, the brand name or equal request. This duplication and the tenor of the request for descriptive literature, as spelled out in paragraph 1-03 of the General Requirements, explain, in part, the generality of the Alandale and Sloan replies and their offers to provide additional information. Initially, bidders are required to decide what data they will furnish at bid opening and what data they will furnish at a later date, if successful bidder, unless they elect to furnish data in accordance with subparagraph "d" of paragraph 1-03. More importantly, bidders were, if anything, encouraged to submit general information, since subparagraph "b" of that paragraph states that the literature submitted with the bid will be evaluated for "general overall compliance with the drawings and specifications." This approach is inconsistent with obtaining the detailed data necessary for determining exactly what the bidder proposes to furnish and in our view influenced Alandale's and Sloan's responses to the brand name or equal requirements.

The brand name or equal clause states that the bidder must furnish information sufficient to allow the establishment of "exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award." The requirement for the submission of literature allowing an evaluation of the "general overall compliance" of the bid with the specification and drawings is not in consonance with the brand name or equal requirement, nor, for that matter, is it in consonance with the standard descriptive literature clause. Further, FPR 1-2.202-5(d) requires the invitation to clearly state what descriptive literature is required with the bid for evaluation, something which was not done here.

Apart from the descriptive literature requirements, the brand name or equal coverage is also deficient. The invitation does provide appropriate spaces for notation of the equal product to be furnished for the floating docks, for the restroom assemblies, for the holding tanks, and for the pump-out units and service units. In this portion of the invitation the bidder is appropriately advised that:

Major components including the floating docks, holding tanks, restroom assemblies, pump out units and service units for the Boat Sanitary Stations and Floating Comfort Stations are specified by brand name or equal. If the offer is based on equal products for these major components, the Manufacturer's name, brand and number shall be inserted in the spaces provided
* * *

However, the major components also consist of items which are individually named in the specification by a brand name or equal description, some of which at least are separate and distinct from the major component, and some of which might be considered to fall within the major component.

FPR sec. 1-1.307-6(b) states that:

Where a component part of an end item is described in the invitation for bids by a "brand name or equal" purchase description and the contracting officer determines that application of * * * [the brand name or equal requirements] to such component part would be impracticable, the requirements * * * shall not apply with respect to such component part. In such cases, if the clause is included in the invitation for bids for other reasons, there also shall be included in the invitation a statement identifying either the component parts * * * to which the clause applies or those to which it does not apply. This paragraph (b) also applies to accessories to an end item where a "brand name or equal" purchase description of the accessories is a part of the description of an end item.

The invitation contains no specific component designation and, in our view, paragraph SP-06, "Trade Names," is inadequate for the purpose of complying with FPR sec. 1-1.307-6(b). A bidder offering an equal product for a major component would be required to guess whether the equal items which were associated with each major component required descriptive literature.

For these reasons, it is our opinion that the present invitation is ambiguous and misleading. Accordingly, we recommend that the invitation be canceled and the procurement readvertised under revised specifications.

As this decision contains a recommendation for corrective action to be taken, your attention is directed to section 236 of the Legislative Reorganization Act of 1970, 84 Stat. 1140, 1171, which requires that you submit written statements to certain committees of the Congress as to the action taken. The statements are to be sent to the Committees on Government Operations of both Houses not later than 60 days after the date of this decision and to the Committees on Appropriations in connection with the first request for appropriations made by your agency more than 60 days after the date of this decision.

The enclosures to the contracting officer's report are returned as requested.

Sincerely yours,

PAUL G. DEMMING

For the Comptroller General
of the United States