

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of AUTOMATED
TELECOMMUNICATIONS, INC.
Under University of Maryland
Contract No. 67286-1-K

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Docket No. MSBCA 1439

September 29, 1989

Brand Name or Equal - Salient characteristics - In a solicitation based on a brand name purchase description, an agency may not reasonably reject the low bid as nonresponsive for failure to meet a feature of the brand name model that was not listed as a salient characteristic in the solicitation.

Defective Specifications - Brand Name or Equal - Failure to list particular features deemed essential to the product solicited by way of a brand name or equal purchase description improperly restricts competition on an equal basis contrary to the procurement statutes.

Brand Name or Equal Specifications - A bid may not be rejected as nonresponsive under a solicitation based on a brand name or equal purchase description, if the bid offers a product that performs the functions sought in the product by the procuring agency and thus is functionally equivalent to the brand name product, and it meets the other salient characteristics listed in the solicitation.

Contract Award - Ratification - Award of a contract based on defective specifications which did not permit bidders to compete on an equal basis is improper, although an agency may consider pursuing ratification of the contract awarded pursuant to the statutory provisions of Maryland procurement law.

APPEARANCE FOR APPELLANT: William F. Casey, Esq.
Abington, MD

APPEARANCE FOR RESPONDENT: Richard A. Weitzer
Assistant Attorney General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: None
(Automation Electronics Corporation)

OPINION BY MR. KETCHEN

This is an appeal from a University of Maryland at College Park (University) procurement officer's final decision holding that Appellant's bid was nonresponsive. Appellant maintains that the equipment it proposed to provide met all of the stated specifications of this brand name or equal solicitation.

Findings of Fact

1. On October 28, 1988, the University issued Bid Request No. 67286-1-K (RFQ) for the purchase of an automated telephone attendant and voice messaging system. The University intended to update its existing telephone information system with this procurement.

2. An automated telephone attendant and voice messaging system allows a caller access, at any time, to recorded audio material. The system guides the caller who dials a central University telephone number to specific information that he may wish to hear through use of a menu of selections of recorded messages.

3. The RFQ specifically referenced by brand name purchase description the "Applied Voice Technology CallXpress 4 port automatic attendant with voice messaging". The RFQ stated that the system must include the following features:

- a. Non Blocking Messaging & Dialing.
- b. Remote Message Change.
- c. Remote Diagnostics.
- d. Remote Programming.
- e. Default to Operator when in call from Rotary Phone.
- f. Management Reports Detailing the Number of Attempts, Completed Calls, Messages Left and Received, Port Busy Study.
- g. Voice Storage Space for a minimum of 9 1/2 hrs.
- h. Be expandable for the future.
- i. Warranty - 1 year parts and labor.
- j. Automated Attendant (fully automated answering and processing of incoming calls).
- k. Voice Messaging System (includes user selectable message lengths, message management, time and date stamps, and automatic voice message taking).
- l. Directories (provide information to callers to the proper person or department).
- m. Call screening (screen calls as desired and inform the system user of caller's identity allowing system user to take call, transfer call, or have the unit take a message).
- n. Do Not Disturb/Custom Not Available Messages (three "not available" messages; one for system wide use and two that may be custom recorded by the individual system user).
- o. Aliases (allows system users to receive calls through more than one user code).
- p. Message Pooling (allows messages left for multiple user codes to be picked up by a single user code).
- q. Message Notification (allows unit to notify users at predetermined intervals that they have messages to retrieve).
- r. Multiple User Types (permits system manager to customize unit to allow different users access to different features depending on their needs).
- s. Statistics (provides statistics on a wide range of system activities, including number of calls received, number of messages left, length of messages left, and status of individual users, as well as port activity).
- t. Feature Access (all user features accessed by touch tone telephone with ring through to operator if from a dial telephone; able to handle four calls to same message at one time, each message starting at the beginning).

4. The University's campus orientation office, which acts as a clearing-house for new students, uses the automated telephone attendant and voice messaging system, which includes over 250 recorded messages, to provide

information and advice about University services, policies, academic requirements, and campus activities. Prerecorded messages for persons calling the system are programmed into the telephone system through the use of a touch-tone telephone. Each recording, which is referred to as a "message box", may be programmed with various messages. For example, a message box reached by a telephone extension may be programmed to play one message between 1 p.m. and 5 p.m. and thereafter to forward all incoming calls made to that particular message box to another extension. Each message box thus can be programmed to have different answering characteristics in addition to the capability of recording actual incoming messages.

5. An automated telephone attendant and voice messaging system that has a display computer terminal (i.e., video display screen), keyboard, and printout capability offers significant benefits in programming and management compared to a system without these features. With a video display screen and keyboard a programmer types the message or answering characteristics desired for each message box. The programmer can then review the message on the video display screen for verification immediately before entering the message into the system through the use of the touch-tone telephone.

Programming ease and verification are particularly important to the University because the University's system will be programmed, staffed and monitored primarily by students who work on a part-time basis. The University emphasized at the appeal hearing that there is a high turnover among the student employees. Thus, newly hired students with a minimal amount of training must be able immediately to program accurate and verified messages into the telephone system. This is readily and accurately accomplished through review on the video display screen. Corrections necessary can be implemented quickly and accurately by use of the keyboard feature. The

University characterizes these features as being absolutely essential to the system it desired to purchase. (Tr. 86). However, these features were nowhere called out in the RFQ as mandatory characteristics.

6. Bid opening took place on November 9, 1988. None of the four bids received offered the CallXpress model referenced in the RFQ. The bids, with the make of equipment offered in brackets, were as follows:

Dictaphone (Digital Express)	\$13,865.00
Appellant (Miami Voice)	\$15,900.00
Automation Electronics Corp. (MAX Receptionist 04/9.5 Hours)	\$16,107.12
Tel Com Ltd. (Nita Receptionist)	\$21,498.00

7. The University rejected Dictaphone's low bid as nonresponsive for failure to meet specification requirements.

8. An on-campus demonstration conducted on November 18, 1988 by Appellant for University representatives revealed that the Miami Voice system did not include a computer type video display screen, a keyboard to facilitate the message programming and reporting functions, or a printout capability. Although these features were not specifically referenced as salient characteristics, these characteristics are design features inherent in the PC computer based CallXpress equipment referenced by brand name.

9. Appellant's equipment uses a touch-tone telephone to enter into the telephone system any changes to the answering characteristics that are desired. The other systems including the brand name CallXpress system also program the telephone system through the touch-tone telephone. However, Appellant's equipment does not provide for visual review of messages before they are entered into the system. In this regard, the University determined that Appellant's system of programming is tedious and more difficult than programming using a video display screen and keyboard. The University also

believes that it is more difficult to verify a message for accuracy on Appellant's equipment during the process of entering it into the system when not using a video display screen and keyboard. Appellant's equipment requires one to call the message after it is entered into the system and listen to it.

10. The RFQ also required that the equipment offered provide a management report capability on a wide range of system activities. For each message box this includes such information as the number of attempted calls placed to the system, calls completed, messages left and received, and port activity. The CallXpress system displays these management reports on a video screen for any or all of the message units. On demand, it provides hardcopy printouts of these management report summaries that the University uses for record keeping and reports.

11. In order to obtain management reports from Appellant's Miami Voice system, one has to separately access each individual message box. The information is then available only in audio form and must be manually recorded while listening to the data. Obviously, no visual display or written hardcopy summaries of system statistics are available. The University desired these features but did not list them as salient characteristics.

12. On November 18, 1988, at the demonstration of Appellant's Miami Voice system at the University, Appellant first learned that the University desired a video display screen, keyboard, and printout capability. Appellant subsequently sent a facsimile of a letter dated November 22, 1988 to the University stating its intent to clarify its bid. Appellant's letter stated that "our bid as submitted includes a CRT Terminal with keyboard, which may be used for programming and which will display detailed management data." However, Appellant's bid and the literature submitted with it did not clearly

indicate to the University that Appellant's Miami Voice system contained the video display screen, keyboard, and printout capability which the University desired.

13. On December 13, 1988, the University awarded the contract to Automation Electronics Corporation as the lowest responsive and responsible bidder. The MAX Receptionist equipment offered by the Automation Electronics Corporation includes the video screen, keyboard, and printout capability printer and meets the other requirements of the solicitation.

14. On December 19, 1988, Appellant protested the University's failure to award it the contract as the low responsive and responsible bidder.

15. The University procurement officer denied Appellant's protest on February 21, 1989.

16. On March 3, 1989, Appellant filed a timely appeal. The appeal hearing was continued until July 20, 1989 at Appellant's request.

Decision

Appellant contends that its Miami Voice system, offered as an equal product, met all the specified essential characteristics set forth in the RFQ and was functionally equivalent to the brand name CallXpress automated telephone attendant and voice messaging system referenced in the RFQ. Appellant thus maintains its bid was responsive.

Although not generally favored over a clear and definite statement in the specifications of the State's minimum needs, State procurement law permits a contracting agency to specify a product it seeks to procure by "brand name or equal" purchase description where detailed specifications are not available. This gives prospective bidders an understanding of the contracting agency's minimum needs. The procurement regulations state as follows:

Brand Name or Equal. Brand name or equal means a specification that uses one or more manufacturer's names or catalog numbers to describe the standard of quality, performance, and other characteristics needed to meet the procurement agency's requirements, and which provides for the submission of equivalent products. Salient characteristics of the brand name item shall be set forth in the specification. (Underscoring added)

COMAR 21.04.01.02 B. See COMAR 21.05.02.13 (bids may not be evaluated based on criteria that are not disclosed in the solicitation).

A bidder is entitled to be advised in the solicitation of the particular features or characteristics of an item referenced by brand name purchase description that the contracting agency requires it to meet in offering an equal product. In other words, a bidder should not be compelled to guess which features of the brand name equipment that the contracting agency considers necessary to meet its minimum needs. See M/RAD Corporation, B-199830, 81-1 CPD ¶138 (1981); Air Plastics, Inc., B-199307, 80-2 CPD ¶141 (1980). A bidder's equipment thus need only meet the salient characteristics of the brand name item that are set forth in the solicitation and need not meet unstated features to be responsive to the solicitation's requirements. See Security Engineered Machinery, B-220557, 85-2 CPD ¶353 (1985); Tel-Med Information Systems, B-225655, 87-1 CPD ¶561 (1987). Thus, "an agency is precluded from rejecting an 'equal' bid for noncompliance with an unlisted specific performance or design feature unless the offered item is significantly different from the brand name product." Industrial Storage Equipment -Pacific, B-228123, 87-2 CPD ¶551 (1987). See also Comp. Gen. Dec. B-177229, February 8, 1973 (a procurement agency could not reject a bid offering an "or equal" item that failed to have a military plug-in feature which the brand name model contained but which was not listed as a salient characteristic); 38 Comp. Gen. 345 (1958).

In addition, a competitive sealed bid solicitation which fails to list all the characteristics which are essential is defective. 41 Comp. Gen. 242, 250-51; Comp. Gen. Dec. B-175953, July 25, 1972. Although a specified brand name product may be standard in the trade, failure to list particular features of the brand name equipment deemed essential to the contracting agency's needs improperly restricts competition on an equal basis contrary to procurement statutes. See Lista International Corp., B-214231; B-214270, 84-1 CPD ¶665 (1984). See also 47 Comp. Gen. 501 (1968).

We sustain Appellant's protest in part. The University had determined prior to issuing the RFQ that a video display screen, keyboard, and printout capability were essential features of the automated telephone attendant and voice messaging system that it sought to purchase. However, the RFQ failed to specify these features as essential by listing them in the RFQ as salient characteristics of the brand name equipment as required by the procurement regulations. COMAR 21.04.01.02B. Accordingly, the University could not properly reject Appellant's bid as nonresponsive for failure to have a video display screen, keyboard, and printout capability, although the brand name CallXpress equipment contained them. See Comp. Gen. Dec. B-177229, February 8, 1973; Comp. Gen. Dec. B-175955, July 25, 1972.

Further, Appellant was prejudiced and the bidders were not competing on an equal basis where the RFQ failed to list the video display screen, keyboard and printout capability as salient characteristics. Flow Technology, Inc., B-228281, 87-2 CPD ¶633 (1987). In this regard, Appellant could have submitted a competitive bid that included the desired features had it known that the University deemed them important. (Tr. 38, 82, 89). Since the RFQ did not clearly specify the University's requirements, bidders, including Appellant, responded to the RFQ based on different, albeit reasonable,

assumptions as to what the requirements were. Amdahl Corp., et al., B-212018, B-212018.2, 83-2 CPD ¶51 (1983). In this regard, the University appropriately should have considered rejecting all bids, cancelling the solicitation, and readvertising when it discovered that Appellant's equipment offered to meet the University's requirements without a video display screen, keyboard, and printout capability which the University deemed essential to meet its minimum needs. See The Fechheimer Brothers Co. and Harrington Industries, MSBCA Nos. 1181B 1182, 1 MSBCA ¶74 (1984).

The University contends, however, that the video display screen and keyboard are such integral components of the brand name CallXpress model that no specific reference was necessary to place prospective bidders on notice that these features obviously were essential characteristics of the system that the University sought to purchase. The University thus believes that equipment offered without these features was not the same equipment as the brand name model. According to the University, equipment similar in design characteristics to the brand name equipment is necessary to provide the minimum required performance capabilities. It thus maintains that the video display screen and keyboard are essential for the student employees to attain the desired accuracy of message programing into the system.

However, the University's unexpressed reasons for the particular design characteristics desired but not listed in the RFQ do not adequately establish that Appellant's bid was nonresponsive where its proposed equipment was not significantly different in function from the brand name item called for in the RFQ. In other words, it was incumbent on the University to list the video display screen, the keyboard, and printout capability as salient characteristics, although the University may have thought it obvious that bidders would know that they were necessary features by its reference to the brand name

CallXpress equipment. Accordingly, the University could not properly reject Appellant's bid as nonresponsive if Appellant's equipment was functionally equivalent to the brand name equipment and if it met all the salient characteristics that were listed in the RFQ. See Western Graphtec, Inc., B-216948, B-217353, 85-1 CPD ¶381 (1985) (particular features listed are presumed material and essential even though not labeled as salient characteristics).

In this regard, Appellant's equipment arguably performs the required automated telephone attendant and voice messaging functions and provides the required management and reporting features listed in the RFQ that the University sought, although it does so without the display screen, keyboard, or printout capability.¹ (Tr. 51-53). Thus, as noted, on a functional basis the Miami Voice equipment Appellant offered in its bid apparently does not differ significantly from the CallXpress equipment. Compare Ciba Corning Diagnostics Corp., B-223131, 86-2 CPD ¶185 (1986) (a contracting agency may not reject a bid as nonresponsive for failure to meet unspecified features of brand name equipment unless the "equal" equipment offered significantly differs from the brand name equipment). In this regard, the Comptroller General of the United States has stated, in pertinent part, as follows:

¹By facsimile of a letter dated November 22, 1988, after first learning of the University's requirement for a video display screen, keyboard and printout capability, Appellant agreed to supply the display terminal and keyboard at no additional charge above the bid price. The University appropriately did not consider this offer in making its determination of Appellant's responsiveness. A bid's responsiveness must be determined from the face of the bid documents at the time of bid opening and not from information subsequently obtained. See Calvert General Contractors Corp., MSBCA 1314, 2 MSBCA ¶140 (1986). See Cybermedic, B-200628, 81-1 CPD ¶380 at 3. Furthermore, the addition of a video display screen, keyboard, and printout capability to Appellant's offer is not a minor informality within the meaning of COMAR 21.06.02.04.

"[T]he... overriding consideration in determining equality or similarity of another commercial product to a name brand commercial product is whether its performance capabilities can be reasonably equated to the brand name referenced. In other words, whether the equal product can do the same job in a like manner and with the desired results should be the determinative criteria rather than whether certain features of design of the brand name are also present in the 'equal' product. 45 Comp. Gen. 462 (1966).

We next address whether Appellant's bid was responsive because its equipment met those salient characteristics of an automated telephone attendant and voice message system that the RFQ did list. Appellant's post-bid opening demonstration apparently did not convince University representatives that Appellant's equipment was responsive to all the essential features that the RFQ listed, although the University did not continue to focus in depth on this aspect of the responsiveness of Appellant's bid once it discovered that Appellant's equipment did not provide the desired video display screen, keyboard, and printout capability. (Tr. 77-82). Assuming, arguendo, that the University completed its evaluation and found Appellant's equipment nonresponsive, we will not set aside that technical determination unless Appellant demonstrates that the University's determination was arbitrary, capricious or unreasonable. Packard Instrument Co., MSBCA 1272, 2 MSBCA ¶125 (1986). We thus deny Appellant's appeal on the ground that it should have been awarded the contract as the low responsive bidder. Appellant has not shown that the University improperly rejected its bid as nonresponsive for failing to meet the salient characteristics of an automated telephone attendant and voice messaging system that were expressly listed in the RFQ.

In summary, Appellant's appeal is sustained in part. The University could not properly reject Appellant's bid as nonresponsive for failure to meet salient characteristics of the brand name equipment that the RFQ did not

list, although it is not clear that the University in concluding that Appellant's bid was nonresponsive conducted an in-depth evaluation of Appellant's equipment regarding the other characteristics that were listed as essential in the RFQ. See 41 Comp. Gen. 242, 250-51 (1961). In any event, the University should not have made a contract award since the solicitation was defective and the bidders thus were not competing on an equal basis. See Comp. Gen. Dec. B-175955 (July 25, 1972).

However, cancellation of the instant contract may not be in the State's best interest. Presumably, the Automation Electronics Corporation's automated telephone attendant and voice messaging system was installed shortly after award and is now functioning. In this regard, Maryland Annotated Code, State Finance and Procurement Article, §11-204 regarding ratification of void or voidable contracts appears to be appropriate for consideration under the circumstances.

For the foregoing reasons, therefore, the appeal is sustained in part and denied in part.