

Findings of Fact

1. On October 24, 1985, the University issued Bid Request (IFB) No. 56453-1-L requesting bids on three (3) liquid scintillation counters¹ (LKB instruments or equivalent) with certain features and including installation, demonstration and operator training, and the optional trade in value of three University owned liquid scintillation counters.

2. The bid was divided into specification Groups I, II, and III to meet the discreet needs of the three users, the Departments of Zoology, Civil Engineering and Environmental Health and Safety.

3. The IFB expressed an urgent need for the equipment and reserved the option to the University to award to either the lowest bidder in each specification group or the lowest aggregate bidder for the three (3) groups.

4. The technical specifications for Group I required in relevant part provision of the following product and capability or equivalent:

1. LKB 1219-802 "Spectral" Liquid Scintillation Counter, floor model, 300 sample capacity, with video terminal and printer and the following.

A. 1219-103 Fraction Plot program package.

B. 1217-106 Refrigeration system.

This equipment was further required by the system specifications to provide:

7. An automatic self-normalization feature that balances the photomultiplier-tubes.

* * *

11. Dynamic and continuous display of spectral and region limits.

5. The 1219-103 Fraction Plot program package is the LKB manufacturer's description of the Histogram Integration features set forth in the specification for Group II. The terms "Fraction Plot program package" and "Histogram Integration" were understood by Appellant to mean the same

* therefore, fails to meet its burden of proof) because it was unlawfully represented by a non-lawyer employee at the hearing. In view of our decision, herein, this issue as a practical matter may be moot. In any event, having considered Respondent's Motion and Memorandum in support thereof, we deny the Motion and proceed to a determination of the merits of Appellant's appeal.

¹A liquid scintillation counter is a machine used to determine the amount of radioactivity in sample material.

thing; histogram/integration being Appellant's manufacturer's description for the functions performed. (Tr. 12, 16-17). These functions refer to the equipment's capability to plot the amount of radiation in a series of samples over time. This capability as described by Dr. Sidney Pierce, a professor in the Department of Zoology and one of those responsible for evaluating the bids for compliance with specifications, was a critical requirement for the equipment sought. (Tr. 49-53). Appellant's descriptive literature that accompanied its bid for all three Groups, describes the histogram/integration feature as being optional rather than standard equipment.

6. The photomultiplier-tubes are the counting device for the liquid scintillation counter. Both the Packard and the LKB models have two photomultiplier-tubes. The Packard model, however, has only one amplifier for both tubes, while the LKB model has separate amplifiers for each tube. The significance of this is that over a period of time the characteristics of the separate photomultiplier-tubes change, and with only one amplifier it becomes impossible to balance one tube without changing the balance of the other tube, thus affecting the effectiveness of the machines balancing feature. In addition, in the case of a power failure, the LKB model is designed for automatic spectra restabilization so that the counts are good from the time the power is restored. This is not true of the Packard model which may take time to restabilize after a prolonged power outage, thus, affecting the accuracy of the count. (Tr. 54-55; Agency Report p. 6).

7. The spectrum display is a device which displays on a monitor a picture of the energy levels the counter is reading. Since the machine will blindly count whatever energy it is programmed to count, the importance of the spectrum display is that it will show the observer if something else is happening with the sample, for example, if a different form of energy is present. The term "dynamic" is used in this context to indicate that the display changes as the data changes. The Packard model, unlike the LKB model, does not offer continuous display of spectra. It has only one screen, and the observer must clear it of all other data to display the spectra. (Tr. 53-54; Agency Report p. 6).

8. Appellant, in response to the Group I specifications, offered to provide a "PACKARD PRIMARY MODEL 4530/PRINTER/PRIOSTAT/LUMINES-CENSE DETECTOR/SPECTRAVIEW/DPM/15 PROGRAM MULTI-USER/REFRIG-ERATION-EQUIVALENT."

9. The technical specifications for Group II required in relevant part use of the following product and capability or equivalent:

1. LKB Model 1219-801 "Spectral" Liquid Scintillation Counter with the following option:

A. LKB 1219-103 Histogram Integration

This equipment also was required to provide an automatic self-normalization feature that balances the photomultiplier-tubes and dynamic and continuous display of spectral and region limits.

In response to the Group II specifications, Appellant offered to provide a "PACKARD PRIMARY MODEL 4430/CART/PRINTER/PRIOSTAT/LUMINES-CENSE DETECTOR/EXTERNAL STANDARD/INTEGRATION-HISTOGRAM/SPEC-TRAVIEW/DP.M/15 PROGRAM MULTI-USER/ELECTROSTATIC CONTROL-LER/RS232-EQUIVALENT."

10. Paragraph 3 of the Standard Terms and Conditions entitled "Specifications" set forth the conditions for the use of equivalent products and provided in relevant part as follows:

Any manufacturer's names, trade names, brand names, information or catalog numbers listed in a specification are to establish a standard for the materials, equipment, supplies or services solicited and are not intended to limit competition. Bidders may offer any brand which meets or exceeds the specification for any item(s). If a Bidder offers an equivalent product or products, he shall indicate on the solicitation form the manufacturer's name(s) and the catalog number(s) or other identifying number(s) of the products offered. The bidder shall also submit with his bid, cuts, sketches, descriptive literature and complete specifications of the product(s) offered. The Bidder shall also explain in detail the reason or reasons why the offered product(s) should be considered equivalent to the product(s) specified and should not be considered a nonresponsive offer. In the absence of all the requested information, the University reserves the right to consider any offer of nonspecified product(s) to be nonresponsive. In any event, the University reserves the right to determine whether an offered product(s) is an approved equivalent to the product(s) specified. Bids lacking any written indication of a bidder's intent to offer an alternate product(s) to that specified shall be received and considered to be in complete compliance with the specifications as listed on the solicitation form.

11. Bids were opened on November 8, 1985. Four bids were received. Beckman Instruments was low bidder for Group I at \$23,106 and LKB was second low bidder at \$24,755. LKB was low bidder for Groups II and III at \$23,990 and \$22,460, respectively. Appellant was low aggregate bidder for the package of three (3) machines at \$68,178; LKB was second at \$69,648.

12. The bids were reviewed by representatives of the end user departments, the buyer, and the Manager of Purchasing. Only the bid of LKB was deemed to be responsive to the specifications for all three groups. It was the technical judgment of the end use representatives that Appellant's proposed equipment for Group I did not offer dynamic and continuous display of spectral limits nor include an automatic self-normalization feature for balancing the photomultiplier-tubes, as required by the Group I system specifications. (Tr. 49-55). It was also determined by the procurement officer from the face of the bid documents that Appellant's bid omitted the Fraction Plot program package (histogram/integration option) as required by the technical specifications for Group I. (Tr. 55-58).

13. LKB was determined to be the low responsive and responsible bidder for each of the three groups and was awarded the contract on November 21, 1985. The equipment was delivered by LKB to the University on November 25, 1985.

14. Appellant protested the award to LKB by letter dated November 25, 1985 on grounds that it was in fact the lowest responsive bidder.

15. The procurement officer denied Appellant's protest by letter dated January 2, 1986. In relevant part the procurement officer's decision stated:

It is the position of the University that, while Packard Instruments Company submitted the lowest bid, the bid was non-responsive for the following reasons. First, the request for bid required vendors to supply the histogram/integration option for Group I and Group II. Packard did not make any reference to this item in the response for Group I. There was no way for the University to know that Packard intended to supply this option for Group I, especially in light of the fact that the response for Group II specifically included the histogram/integration option.

In addition, according to the evaluation by the end user, the Packard model was not able to automatically balance the PIM tubes or offer dynamic and continuous display of spectra. Both of these features are specified in the bid request.

The decision to consider the Packard Instrument Company non-responsive was based on the above factors. All of the items mentioned are specified in the bid, and considered to be significant features which were omitted in the Packard response. The University can only evaluate the bid on the basis of the information contained in the response. We, therefore, determined that the Packard model did not meet all of the specifications.

16. Appellant in its notice of appeal filed with the Board on January 10, 1986 set forth the following as grounds for appeal:

- A. Contracting agency failed to award this bid to Packard Instrument Company even though they were a lower bidder than LKB Instruments; claiming Packard's proposal was non-responsive for Group I of a three group bid. No explanation was given for failure to award Group II and Group III to Packard Instrument.
- B. Contracting agency claims we were non-responsive in not referencing to "histrogram/integration option" for Group I, when in fact their solicitation never uses this term but rather a specific manufacturer's description "Fraction Plot program package." The "Standard Terms And Conditions Of Solicitations" accompanying this bid request state "Any manufacturer's names, trade names, brand names, information or catalog numbers listed in a specification are to establish a standard for the materials, equipment, supplies or service solicited and are not intended to limit competition." My letter of protest explained that Packard may have omitted description of this option but did specifically indicate "EQUIVALENT" on our bid reply, rather than "ALTERNATE." "Standard Terms and Conditions" states "Bids lacking any written indication of a bidder's intent to offer an alternate product(s) to that specified shall be received and considered to be in complete compliance with the specifications as

listed on the solicitation form." Packard Instrument made no indication of intent to offer an alternate; but did in fact state "EQUIVALENT" for all three groups.

- C. Contracting agency further states that Packard "was not able to automatically balance the PM tubes or offer dynamic and continuous display of spectra" for Group I. This is an assumption which is erroneous based on available proof from expert witnesses in the field and/or present owners of the Packard instrument proposed for Group I.

17. At the hearing of the appeal Mr. Jerry Guthrie, a sales representative responsible for Appellant's bid submission, testified that use of the word "equivalent" by Appellant in its response to the specifications was intended to encompass the histogram/integration feature (Fraction Plot program package) for Group I. (Tr. 10-12, 18-22). This testimony was mirrored by Mr. John Cassell, Appellant's Eastern Regional Manager. (Tr. 24-27). The omission of reference to the histogram/integration feature in Appellant's response to the Group I specifications was inadvertent according to Mr. Guthrie.² (Tr. 11).

18. Mr. James E. Robertson, Appellant's Vice President, Engineering, also testified at the hearing. Mr. Robertson described the differences between Appellant's equipment and that of LKB as to the method of achieving balance of the photomultiplier-tubes and display of spectra. (Tr. 28-37). Mr. Robertson acknowledged that power outages of prolonged (12 hour) duration could adversely affect the ability of Appellant's proposed equipment to maintain balance of the photomultiplier-tubes so that the integrity of the measure (count) of the level of radioactivity during an experiment might be compromised. (Tr. 36-37). However, as noted above, the LKB equipment is designed for automatic spectra restabilization so that the counts are good from the time the power is restored thus avoiding the need for time consuming calibration. Mr. Robertson's testimony also confirmed that the Packard equipment, unlike the LKB equipment, does not offer continuous display of spectra since it has only one screen which shares data and thus the operator must clear off all other data to display the spectra. (Tr. 33-35).

While acknowledging these differences in performance characteristics, the main thrust of Appellant's testimony is that the LKB system is more sophisticated than the actual needs of the user require.

²Mr. Guthrie's testimony on this point was as follows:

It is my contention that the proposal submitted, as a reply to the solicitation, by Packard Instrument Company, did not in any way specify that we intended to supply an alternate product. As a matter of fact, it did, in fact, spell out that we intended to supply an equivalent product to that listed in the specifications. Very candid, there was a typo. When a secretary typed up the bid, and that particular specification was not listed in our response. (Tr. 11).

Decision

The essence of Appellant's appeal³ is that its equipment offered in response to the specifications for Group I was equivalent to the equipment listed, included the histogram/integration feature and was capable of performing all required functions to include automatic balancing of the photo-multiplier-tubes and dynamic and continuous display of spectra. These assertions must be measured against legal principles that require that responsiveness be determined from the face of the bid documents. Excelsior Truck Leasing Company, Inc., MSBCA 1102 (May 6, 1983) at p. 6; Inner Harbor Paper Supply Company, MSBCA 1064 (September 9, 1982) at p. 5. Where compliance with specifications is an issue, Appellant bears the burden of demonstrating that the expressed technical judgment of the procuring agency is clearly erroneous. See: Adden Furniture, Inc., MSBCA 1219 (January 2, 1985); M/A-COM, Inc., MSBCA 1258 (September 23, 1985). For reasons that follow, we will not disturb the procurement officer's determination that Appellant's bid was nonresponsive and, accordingly, deny the appeal.

The IFB specifications permitted bidders to offer products equivalent to the specified brand name and Appellant proposed to provide its own equipment as equivalent to the specified LKB model. With respect to the Group I equipment, however, Appellant did not specifically mention that it was offering the required Fraction Plot program package (histogram/integration feature) and its bid was accordingly deemed nonresponsive.

Appellant contends, however, that its use of the word "EQUIVALENT" on its bid reply for Group I brings its bid within the terms of paragraph 3 of the Standard Terms and Conditions regarding use of equivalent products and indicates its commitment to supply the histogram/integration feature for Group I even though such feature (described as an option in Appellant's literature) is not specifically mentioned. It asserts that pursuant to the provisions of Paragraph 3 of the Standard Terms and Conditions it would have used the word "alternate" if it did not intend to offer exactly what the specifications called for. We think this reading of the terms "equivalent" and "alternate" places a very strained construction on the proper application of

³Appellant also contends that the University improperly failed to award it a contract for the Group II and Group III equipment. However, Appellant did not submit the low bid for the Group II and Group III equipment. The low bid for Group II and Group III was submitted by LKB whose bid for these groups was also considered by the University to be responsive to the terms of the IFB. Since Appellant has not challenged the University's determination that LKB was the low responsive bidder for Groups II and III and has not challenged the finding by the University implicit in the procurement officer's award that LKB is a responsible bidder its protest has no basis, and being raised for the first time on appeal is otherwise untimely under COMAR 21.10.02.03B. Accordingly, its appeal on these grounds is denied.

Paragraph 3. However, assuming arguendo the correctness of Appellant's assertion, the word "EQUIVALENT" also appears on its bid reply for Group II as does the verbiage "INTEGRATION-HISTOGRAM"; i.e., the histogram/integration feature was specifically included in Appellant's response for the Group II equipment but not mentioned in Group I and the equipment proposed for both groups was denominated as equivalent. Under these circumstances, and notwithstanding the provisions of paragraph 3 of the Standard Terms and Conditions and Appellant's assertions, we find that descriptions on the face of the bid documents for the products offered for Group I and Group II create an ambiguity as to whether the required histogram/integration feature was in fact offered for Group I. It is as reasonable to assume that Appellant was offering to provide such equipment for Group I as to assume it was not. Where a bid on its face is subject to two or more reasonable interpretations, as in the instant case, it is ambiguous and must be rejected by the procurement officer if the ambiguity affects the price, quantity, quality or delivery of the goods or services in other than a negligible fashion. COMAR 21.06.02.03. See: Franklin Instrument Co., Inc., Comp. Gen. Dec. B-204311, 82-1 CPD ¶105 (February 8, 1982); Railway Specialities Corporation, Comp. Gen. Dec. B-212535, 83-2 CPD ¶519 (October 31, 1983); Free State Reporting, Inc., MSBCA 1180 (June 14, 1984) at p. 8. See also: The Driggs Corporation, MSBCA 1243 (July 26, 1985); Long Fence Co., Inc., MSBCA 1259 (February 13, 1986).

The procurement officer characterized the histogram/integration feature as a "significant feature[s] . . . omitted in the Packard response" and Dr. Pierce, who participated in evaluation of the bids, described it as a "critical" part of the equipment. As a "critical" or "significant feature," absence of mention of the histogram/integration feature affects the quality of the product offered in other than a negligible fashion and as such represents a material deviation from the terms of the IFB requiring its rejection. See: COMAR 21.06.02.02B(2); Quaker-Cuisine Services, MSBCA 1083 (September 6, 1983) at p. 6; Excelsior Truck Leasing Company, Inc., *supra* at pp. 4-5. Compare Prestex Inc. v. United States, 162 Ct.Cl. 620, 320 F.2d 367 (1963). Accordingly, the University properly rejected Appellant's bid as being non-responsive.

The University also concluded that the equipment Appellant offered was not able to automatically balance the photomultiplier-tubes or provide dynamic and continuous display of spectra as required by the specifications for Group I.

Appellant has not shown these technical determinations to be erroneous. Therefore, its appeal on these grounds must be denied as well. Adden Furniture, Inc., *supra*; M/A-COM, Inc., *supra*. Questions raised by Appellant through testimony at the hearing concerning the University's need for the precise characteristics of the LKB equipment as set forth in the specifications are untimely. Any such concerns were required to be addressed through protest of the specifications prior to bid opening. See: M/A-COM, Inc., *supra* and cases cited therein at p. 5; COMAR 21.10.02.03A.