

Protest of ) Date: December 17, 1987  
BRYANT ORGANIZATION, INC. )  
Sol. No. 059984-87-A-0107 ) P.S. Protest No. 87-96

### DECISION

Bryant Organization, Inc. (Bryant), timely protests award of a roofing contract to Northern Virginia Construction Corp. (Northern Virginia), alleging Northern Virginia's bid is nonresponsive in that the roofing materials which it proposed to utilize do not comply with the specifications of the solicitation.

Invitation for Bids No. 059984-87-A-0107 (the IFB), for replacement and repair of the roof at the Fresno, CA, main post office, was issued August 31, 1987, by the Facilities Service Center, San Bruno, CA.

The specifications<sup>1/</sup> provide in section 07515, paragraph 1.04 A. 1 that:

The materials and methods described are based on the specifications of Tremco [a manufacturer of roofing materials] ... and are given to designate the quality of materials and systems required. Equivalent materials and similar methods by other manufacturers will be acceptable, provided all criteria is [sic] met and submitted with bid documents.

Section 07515, paragraph 2.02 states:

ACCEPTABLE MANUFACTURERS  
TREMCO ... "or equal"

Section 07515, paragraph 1.04 C requires:

Underwriters Laboratories, Inc. Class A [fire rated] Roofing System

Section 07515, paragraph 1.10 A provides:

<sup>1/</sup> Bryant, which is a California distributor and installer of the specified Tremco system, served as an expert consultant in the drafting of the specifications.

A bidder who proposes to quote on the basis of substituted materials or systems shall submit with bid documents the following information:

1. Written application for approval of alternate and why alternate should be considered.
2. Certification from U.S. Testing Laboratory, Los Angeles, California, indicating alternate materials or systems meet or exceed those specified in Part 2 PRODUCTS- MATERIALS.
3. Provide a list of at least 5 jobs where proposed alternates were used under similar conditions within a 50 mile A radius of Project building and available for Contracting Officer inspection.
4. The Contracting Officer will make the final determination whether proposed alternates will be accepted.

Four bids were received by the September 21 bid opening date, of which Northern Virginia's \$476,000 bid was low and Bryant's \$505,462 bid<sup>1/</sup> was second low. After submission of its bid but before bid opening, Northern Virginia submitted, for the approval of the contracting officer, documents describing a different roofing system from the brand name system referenced in the specifications. The proposed system<sup>1/</sup> was approved by the contracting officer, and award of the contract made to Northern Virginia on September 24.

Bryant contends that the system proposed by Northern Virginia is not equivalent to the Tremco Cold Applied Roof System. It claims that the Karnak system does not have a Class " " fire rating as the specifications require at paragraph 1.04 C of Section 07515. The protester next contends that section 1.12 requires a 10 year manufacturer's guarantee on labor and material which it alleges the Karnak system fails to provide. It claims that the Karnak system is a lighter polyester sheet than the Tremco system, and that parapet walls and angles, as well as the expansion joint, must be covered with a reinforced Hypalon sheet rather than the Karnak system's less expensive lightweight polyester sheet.

Bryant notes that while systems other than the Tremco system may be accepted by the contracting officer as equivalents, the solicitation requires, at section 1.10 A, the submission of 1) a written application for approval of the alternate system, 2) certification that the alternate system meets the requirements of the Tremco system set forth in the specifications, and 3) a list of at least five jobs where the proposed system was successfully used under similar circumstances. Bryant alleges that

<sup>2/</sup> Bryant also submitted an alternative bid of \$443,949. The contracting officer determined Bryant's alternative bid, which proposed a one-ply system rather than three-ply as utilized in the specified Tremco system, to be nonresponsive for using dissimilar materials.

<sup>3/</sup> Northern Virginia proposed to install the Karnak 3 Ply Poly-Mastic cold process roof system, and provided manufacturer's literature from which the contracting officer determined the proposed system to be equivalent to the Tremco system identified in the solicitation.

Northern Virginia did not fully comply with these requirements. Bryant also questions why its alternative proposal, which was lower than Northern Virginia's, was not accepted.

After the submission of Bryant's protest, the contracting officer learned that, as Bryant alleged, the Karnak system did not have a Class "A" fire rating from Underwriters Laboratories, Inc., (U/L), as required by the specifications and, on October 28, the contracting officer determined that system to be unacceptable. Northern Virginia was directed to submit an alternative proposal within 5 days. Shortly thereafter, Northern Virginia proposed using the Garland Co. 3-ply cold process system ("the Weatherking") as an alternative. Performance of the contract has been delayed until fire testing results can be compiled and the Weatherking system can be delivered to the contract site.

The contracting officer contends that Northern Virginia's Karnak system, which was upgraded where necessary, met each criterion of the original specifications except the U/L Class "A" fire rating, which the contracting officer maintains was considered by all to be an easily obtained formality. Substitution of the Garland Weatherking system was allowed after the contract was awarded to Northern Virginia, and the contracting officer states that once the testing laboratory rates the Weatherking as a Class "A" fire rated system, as is expected, then the Weatherking will meet all criteria of the original specifications.<sup>4/</sup>

Postal Contracting Manual (PCM) 1-1105.2 and .3 sets forth the circumstances in which a brand name or equal purchase description may be used. Although not utilizing the brand name or equal provision specified in the PCM, the solicitation did make it clear in paragraphs 1.04, 1.10 and 2.02 that a brand name or equal purchase description was being employed. Where a brand name or equal clause is present, the solicitation must set forth salient characteristics with which the "equal" product must materially conform. American Chain and Cable Co., Inc., P.S. Protest No. 76-27, September 20, 1976. Any contention that the use of the brand name or equal description was improper, or any criticism of the description of the salient characteristics, is a protest against the terms of the solicitation and here would be untimely pursuant to PCM 2-407.8 d (1). See Mr. Scrub Car Wash Systems, Inc., P.S. Protest No. 75-50, August 15, 1975. Paragraphs 1.04, 1.10 and 2.02 indicate that the Class "A" fire rating was a salient characteristic of the system to be bid.

We will not overturn the decision of a contracting officer that an "equal" bid is responsive if it has a substantial basis in fact. The responsiveness of the offered equal product depends on whether the contracting officer can determine material conformance from the information submitted with the bid. American Chain and Cable Co., Inc., supra.

<sup>4/</sup> Northern Virginia has expressed the view that the specifications were poorly written, and are restrictive as greatly favoring the submission of the Tremco system. As the time for protesting the terms of the solicitation has expired, see Postal Contracting Manual 2-407.8 d (1), we decline to review that issue, and note that the contractual requirements must be satisfied as written.

The solicitation required proposed equal bids to be in conformance with the specifications, including the requirement that the proffered system have a Class "A" fire rating. The Karnak system, bid by Northern Virginia, did not have such a rating. This rendered it nonresponsive despite Northern Virginia's assurances that the system met all specifications and that obtaining the required fire rating was a mere formality.<sup>17</sup> Such assurances cannot be considered by the contracting officer in determining responsiveness. See Clark Equipment Co., Modular Automation Corp., P.S. Protest Nos. 83-23 & 25, June 27, 1983. The contracting officer, after award, determined that the Karnak system was unacceptable because it failed to include the requisite fire rating, just as Bryant alleged. To allow Northern Virginia's bid to become responsive by the substitution of another system after contract award would allow it an impermissible second bite at the apple. See L.P. Fleming, Jr. Hauling, Inc., P.S. Protest No. 83-64, December 19, 1983. The contracting officer's determination that Northern Virginia's Karnak system, submitted without certification of a Class "A" fire rating, was responsive to the stated solicitation requirements, lacked a substantial basis in fact; therefore the protest is sustained.

Since performance of the contract has not yet begun, and the costs of cancellation are therefore minimal, cancellation of the contract of Northern Virginia is the appropriate remedy. Should the contracting officer determine that Bryant's bid, which is second low, meets the requirements of the solicitation and is otherwise acceptable, the contract may be awarded to Bryant. Should the contracting officer determine however, that deficiencies exist in the specifications, he may revise and resolicit the requirement.

The protest is sustained.

William J. Jones  
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Office of Contracts and Property Law

**[Compared to original 3/15/93 WJJ]**

<sup>5/</sup> Bryant's contentions regarding deficiencies in Northern Virginia's bid other than the lack of a Class "A" fire rating on the Karnak system and the certifications missing from Northern Virginia's bid, are unsupported in the record and would not entitle Bryant to relief. Unsupported allegations, standing alone, are an insufficient basis upon which to sustain a protest Penny H. Clusker, P.S. Protest No. 80-37, August 27, 1980. These allegations are insufficient to overcome the presumption that the contracting officer was correct, see Edsal Machine Products, Inc., P.S. Protest No. 85-84, January 29, 1986, in his decision that the "or equal" bid was in material conformance with the solicitation. See Mr. Scrub Car Wash Systems, Inc., supra. We do not decide whether the absence of some of the submissions required to accompany the proposal of an alternative system pursuant to section 07515, paragraph 1.10, are sufficient, in themselves, to render the bid nonresponsive, nor do we reach the propriety of the rejection of Bryant's alternative proposal, as its protest is sustained on other grounds.