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**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Tri Tool, Inc.

**File:** B-265649.2

**Date:** January 22, 1996

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Dan Skorcz for the protester.

Granette A. Trent, Esq., Department of Justice, for the agency.

Robert C. Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

Protest of rejection of equal product offered in response to a brand name or equal procurement is sustained where rejection was based on bidder's failure to meet salient characteristics that were not set forth in the solicitation.

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## **DECISION**

Tri Tool, Inc. protests the rejection of its bid under invitation for bids (IFB) No. 1PI-B-1498-95, issued by the Department of Justice, Federal Prison Industries, Inc. (FPI),<sup>1</sup> for pipe cutting components, which are to be assembled by FPI into kits for the Department of the Army. The protester alleges that its bid was improperly rejected as nonresponsive.

We sustain the protest.

The IFB was issued on May 25, 1995, with bid opening on June 26. Section B of the solicitation, the schedule of items, contained 43 line items representing different pipe cutting components for which bidders were to offer a firm fixed price. Award was to be made on an all-or-none basis to the lowest responsible bidder whose products conformed to the item descriptions set forth in section B.

Each line item description referred to a part number from the incumbent contractor--E.H. Wachs Company--and contained the phrase "or equal." Some of the line item descriptions also contained design and performance requirements and many referenced a national stock number (NSN). Although section L of the

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<sup>1</sup>FPI is a wholly owned government corporation within the Justice Department that operates under the trade name "UNICOR" at various federal correctional institutions in the federal prison system. FPI operates approximately 100 factories at 53 different locations that manufacture a variety of products for the government.

solicitation generally informed bidders where they could obtain government specifications, no specifications were referenced in the item descriptions.

Three bids were received. Tri Tool, which offered an "equal" line of pipe cutting components, submitted the low bid of \$273,854; Wachs bid its own line of components, as listed in the IFB, and submitted the next low bid of \$458,128.

After bid opening, FPI realized that through what the agency called an "oversight," the phrase "or equal" was included in the item descriptions. FPI also realized that the IFB did not contain the standard "brand name or equal clause" which alerts bidders to include information in their bids sufficient to establish the equality of the products they are offering to the listed brand name. Nonetheless, FPI elected to treat the procurement as a "brand name or equal" procurement and contacted Tri Tool to give the firm two opportunities to submit descriptive literature so that the agency could determine whether the protester's bid satisfied the solicitation requirements. In response, Tri Tool indicated that it was modifying its standard line of pipe cutting equipment and provided six sketches of various equipment it was offering to supply. Tri Tool also indicated that the 8-inch pipe cutting machine it proposed to supply has an internal ring gear rather than an external ring gear as featured in Wachs's machine.<sup>2</sup>

The Army evaluated this information and based on the Army's recommendation, FPI determined that the protester had not offered equal equipment. Specifically, the agency found that the sketches of tool bits (line items 0041, 42 and 43) did not conform to dimensional requirements of the Army and that Tri Tool's sketch of a pneumatic drive bracket (line item 0011--also called a mounting flange) was inadequate to "complete an evaluation of its acceptance." The agency also expressed concern about Tri Tool's proposal to modify its standard equipment and questioned whether the firm had ever manufactured the tool bits or brackets before. Finally, the agency reports that it was concerned that Tri Tool had offered a pipe cutting machine with an internal ring gear.

Tri Tool's bid was rejected as nonresponsive, award was made to Wachs and this protest followed. Tri Tool alleges, inter alia, that its bid was improperly rejected for failure to satisfy requirements which were not set forth in the solicitation. For the reasons set forth below, we agree.

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<sup>2</sup>Insofar as this was a sealed bid procurement, the agency acted improperly by giving Tri Tool an opportunity to establish acceptability of the product it was offering after opening. See GTA Containers, Inc., B-249327, Nov. 3, 1992, 92-2 CPD ¶ 321.

To be responsive under a brand name or equal solicitation, a bidder offering an equal item must provide sufficient descriptive literature to permit the contracting agency to assess whether the product possesses each salient characteristic of the brand name specified in the solicitation. Industrial Storage Equip.-Pac., B-228123, Dec. 4, 1987, 87-2 CPD ¶ 551. The contracting agency, however, has an obligation to inform bidders of the characteristics that are essential to the government's needs. Thus, a product offered as an "equal" one need not meet unstated features of the brand name product and, where an agency does not include a list of salient characteristics in the solicitation, the agency is precluded from rejecting an "equal" bid for noncompliance with a specific performance or design feature unless the offered item is significantly different from the brand name product. Id. Moreover, it is improper to reject a product as being not equal to the brand name product because of concerns that a firm may modify its standard products to conform to the government's needs or because the firm may not have sufficient experience in manufacturing the required equipment if the solicitation does not preclude the modification of standard products or specify minimum experience requirements. See NITCO, B-246185, Feb. 21, 1992, 92-1 CPD ¶ 212.

The record discloses that none of the requirements forming the basis for rejecting Tri Tool's bid were set forth in the IFB. The item descriptions for the rejected tool bits (items 0040-43) contain no dimensional requirements—rather, they merely reference Wachs's part numbers without stating what features of the brand name are essential to the agency's needs. The same is true of the rejected mounting flange (item 0011). An examination of schedule B also discloses no specification for an external ring gear. Finally, the solicitation did not preclude modification of existing product lines to satisfy the government's needs nor did it contain any experience requirements.

Thus, even assuming that the agency could have properly evaluated the information submitted by Tri Tool after bid opening (which it could not), the agency could not properly reject the protester's bid for the reason it did because the agency's requirements were not set forth in the solicitation.

We recommend that Wachs's contract be terminated and the government's requirements be resolicited with specifications which are appropriately tailored to communicate the actual requirements. (In making this recommendation, we take into consideration the agency's statement that the salient characteristics which were omitted from the solicitation and formed the basis for rejecting the protester's bid are essential to the Army's needs.) We also find that Tri Tool is entitled to be reimbursed for its cost of pursuing this protest, including reasonable attorneys' fees.

Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1995). The protester should submit its detailed and certified claim directly with the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.6(f).

The protest is sustained.

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