

BRAND NAME PRODUCT MEETS BRAND NAME SPECIFICATION

Copyright © 2016 Richard D. Lieberman, Consultant and Retired Attorney

Agencies can frequently obtain competition by using “brand name or equal” purchase descriptions. Recently, the Department of Veterans Affairs (“VA”) rejected a contractor’s submission to install the exact brand name “patient headwall system” in a contract. The VA agency asserted that the system did not meet the separate and additional “salient characteristics” specified for the “or equal” system. *R.A. Glancy & Sons, Inc v. Dept of Veterans Affairs.*, CBCA 4060, Jan 15, 2016.

Brand Name or Equal

Agencies may use brand name or equal purchase descriptions. However, to prevent improper sole-sourcing, “brand name or equal purchase descriptions must include, in addition to the brand name, a general description of those salient physical, functional, or performance characteristics of the brand name item that an ‘equal’ item must meet to be acceptable for award.” FAR 11.104.

The Contract

The contract included the following VA acquisition regulation clause:

[I]tems called for by this invitation for bids have been identified in the schedule by a “brand name or equal” description, such identification is intended to be descriptive, but not restrictive, and is to indicate the quality and characteristics of products that will be satisfactory. Bids offering “equal” products (including products of the brand name manufacturer other than the one described by brand name) will be considered for award if such products are clearly identified in the bids and are determined by the Government to meet fully the salient characteristics requirements listed in the invitation.

* * *

Unless the bidder clearly indicates in the bid that the bidder is offering an “equal” product, the bid shall be considered as offering a brand name product referenced in the invitation for bids.

VAARS 852.211–73.

During performance of the contract, Glancy offered the brand name product, (an “Elements Headwall System Manufactured by Hill-Rom Co.”). This product had laminate countertops and high pressure laminate cabinetry. The VA insisted that the product meet two additional salient characteristics that had been specified in the contract for the “equal” product: quartz countertops and thermofoil cabinetry.

The Board rejected the VA’s interpretation of the contract, noting that contract language had to be interpreted according to its plain meaning. The Board held that it was clear that a contractor is entitled to provide *either* the system as manufactured by Hill-Rom *or* an equal product that conforms to the salient features designated by the VA. There is no way to read the clause other

than to permit a contractor to provide the identified brand name product specified—otherwise the term “*or*” would be rendered meaningless. The brand name satisfies the brand name portion of the clause, and the contract did not limit the acceptability of the brand name product.

The Board noted that if the government needs features that are different from those of the brand name, the solicitation and contract must make it clear that the product will have to be modified to include certain features, or it will not be unacceptable. “Placing features in the list of salient characteristics does not modify the brand name designated” product.