



**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** FFR-Bauelemente + Bausanierung GmbH

**File:** B-274828

**Date:** January 7, 1997

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Paul D. Reinsdorf, Esq., for the protester.

Maj. Samuel T. Stevenson, Department of the Army, for the agency.

Jeanne W. Isrin, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Bid offering an "equal" window was properly rejected as nonresponsive where the bid documents submitted failed adequately to identify the exact item offered, thereby precluding evaluation as to whether the item met the specified salient characteristics of the brand name product; information submitted by the bidder after bid opening identifying the specific "equal" window offered could not correct the deficiency because bid responsiveness must be ascertained from the bid documents themselves or other information reasonably available to the agency prior to bid opening.

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## DECISION

FFR-Bauelemente + Bausanierung GmbH (FFR) protests the rejection of its bid as nonresponsive and the consequent award of a contract to Bauunternehmung Ehrenfels (Ehrenfels) under invitation for bids (IFB) No. DAJA22-96-B-0063, issued by the Wiesbaden Regional Contracting Center, Department of the Army, for the insulation and painting of buildings 6534 and 6539 in Roman Way Village, Butzbach and buildings 6402 and 6403 in Marshall Village, Giessen, two military housing areas in Germany. The Army rejected FFR's bid because the bid documents did not demonstrate that FFR was offering a product "equal" to the brand name product specified in the IFB.

We deny the protest.

The IFB, which contemplated award of a firm, fixed-price construction contract, contained three sets of specifications, the first for work to be done to building 6534, the second for building 6539, and the third for buildings 6402 and 6403. All three sets of specifications included the requirement that the windows be "Thermally insulated aluminum window-frame of profile series 'Hartmann-Systherm', or equal, with heat transition co-efficient  $K=2,8 \text{ w/qm} \times K$ ." The specifications listed a

number of salient characteristics, including required dimensions and colors, for the windows, with slight variations among the three sets.

The IFB included the standard clause found at Defense Federal Acquisition Regulation Supplement (DFARS) § 252.211-7003, entitled "Brand Name or Equal" (Dec. 1991), which provides, in pertinent part, that to be considered for award, offers of "equal" products must:

"(1) Meet the salient physical, functional, and other characteristics specified in this solicitation;

"(2) Clearly identify the item by--

"(i) Brand name, if any; and

"(ii) Make or model number;

"(3) Include descriptive literature such as cuts, illustrations, drawings, or a clear reference to previously furnished descriptive data or information available to the Contracting Officer. . . ."

In addition, paragraph K.9 of the IFB required that offerors intending "to provide products, equipment, material, articles, or patented processes which differ from the brand name, trade name, make, model, or catalog number described in the specifications" enter the following information:

Specification Page and Position	Brand Name Mentioned Plans or Specifications	Description of Material or Equipment, Name, Make, Model Number, Model or Catalog Number, Date and Item offered
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

The DFARS clause advised that the "Contracting Officer will evaluate 'equal' products on the basis of information furnished by the Offeror or identified in the offer and reasonably available to the Contracting Officer"; it specifically cautioned that "[t]he Contracting Officer is not responsible for locating or securing any information not identified in the offer and reasonably available."

FFR submitted the low bid of the 13 bids received by bid opening. Under paragraph K.9 of its bid, FFR referenced the window specification in the third set of

specifications (buildings 6402 and 6403) and entered the brand name "Schueco" and the description "Iskootherm window." FFR, however, did not identify a specific model number of window; nor, according to the Army, did FFR submit any descriptive literature with its bid. Although contracting officials were able to locate a Schueco catalogue, they found that Schueco manufactured many items, and that without a make, model number, or detailed description to identify the exact item offered, no evaluation to ascertain conformance with the salient characteristics could be made. Since the agency could not determine whether FFR's proposed window was an acceptable "equal" to the name brand window, it rejected FFR's bid as nonresponsive and instead made award to the next low, responsible bidder, Ehrenfels.

FFR argues that its bid contained sufficient information to establish that the Schueco window it offered was equal to the brand name specified. FFR claims that it in fact submitted general brochures regarding Schueco windows.<sup>1</sup> Further, FFR asserts that, in any case, Schueco is a large, well-known firm whose catalogues are widely available and known to the government, and that based on these, contracting officials should have been able to determine the equality of the Schueco window. According to the protester, identification of the exact model window offered was not necessary as no specific Hartmann-Systherm model was identified in the IFB.

To be responsive under a brand name or equal IFB, bids offering "equal" products must conform to the salient characteristics of the brand name product listed in the solicitation. A bidder must submit, with its bid, sufficient descriptive literature to permit the contracting agency to assess whether the "equal" product meets all the salient characteristics specified in the IFB. Advanced Medical Sys., Inc., B-258945, Feb. 13, 1995, 95-1 CPD ¶ 67. When the descriptive literature submitted with the bid or other information reasonably available to the agency does not show compliance with all salient characteristics, the bid must be rejected. Lappen Auto Supply Co., Inc., B-261475, Aug. 14, 1995, 95-2 CPD ¶ 68; AZTEK, Inc., B-229897, Mar. 25, 1988, 88-1 CPD ¶ 308.

The rejection of FFR's bid was proper. The IFB required bidders offering equal products to identify the item by brand name and make or model number, and provide descriptive literature or a clear reference to previously furnished descriptive data or information available to the contracting officer which demonstrated the equality of the offered item. The record indicates that FFR, however, submitted a bid which offered as an equal Schueco brand Iskootherm windows, but failed to provide a make or model number or otherwise sufficiently identify a specific window such that the agency could evaluate its compliance with the salient

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<sup>1</sup>In rebuttal, the agency has submitted a statement from the bid opening officer in which she states that no brochures were submitted with FFR's bid.

characteristics. Although FFR claims to have submitted with its bid general brochures regarding Shueco windows, we note that FFR has not submitted copies of the specific brochures it allegedly provided prior to bid opening, nor specifically explained how they or any other Schueco catalogue available to contracting officials prior to bid opening established the compliance of its offered item with all of the stated salient characteristics, including required dimensions and colors.<sup>2</sup> Schueco manufactures more than one window system, and regardless of what brochures or catalogs were available to contracting officials, without identification of the exact item FFR was committed to furnishing, no evaluation could be made as to whether the offered item met all of the salient characteristics listed in the IFB. As for the IFB's failure to identify a specific make or model number of Hartmann-Systherm window as the brand name, this was of no consequence since items offered as equals were to be evaluated against the stated salient characteristics. (Indeed, a bid offering a brand name item that does not comply with the stated salient characteristics must be rejected as unacceptable. Tel-Med Info. Sys., 66 Comp. Gen. 504 (1987), 87-1 CPD ¶ 561.)

FFR notes that in response to the Army's post-bid opening inquiries, it identified its offered item as the Schueco Royal S 65 window and submitted descriptive literature for that model such that the agency was able to determine that the Schueco Royal S 65 window would be technically acceptable. However, bid responsiveness must be ascertained from the bid documents themselves, or other information reasonably available to the agency prior to bid opening, and not from explanations or clarifications provided by the bidder after bids have been opened and bid prices exposed. PRO/DES, Inc., B-256541, June 30, 1994, 94-1 CPD ¶ 395. Since only by querying FFR after bid opening could it be determined what window FFR was offering as an equal and thus whether it complied with the stated salient characteristics, FFR's bid was nonresponsive and could not be accepted.

The protest is denied.

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of the United States

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<sup>2</sup>While FFR notes that all Shueco systems comply with German industrial standards, it does not explain why this demonstrates compliance with all of the stated salient characteristics, including required dimensions and colors.