



Agenda Item No. 6.A.1.

To: Board of Directors
Meeting of October 23, 2009

From: Celia G. Kupersmith, General Manager

Subject: **CONSIDER PROTEST SUBMITTED BY BATTERIES USA, INC.
RELATIVE TO CONTRACT NO. 2010-BT-3, HEAVY DUTY BATTERIES**

Recommendation

It is recommended that the Board of Directors reject the protest submitted by Batteries USA, Inc. relative to Contract No. 2010-BT-3, *Heavy Duty Batteries*, based on lack of compliance with technical specifications and warranty requirements and failure to provide information relevant to its request for an approved equal.

Background

Recently the staff issued an Invitation to Bid for heavy duty batteries for use in the Bus Division, as a routine procurement falling within the General Manager's purchasing limits. The specifications called for the provision of an Interstate brand battery or approved equal and a two year full-replacement warranty.

During the procurement process, Batteries USA submitted a request for a Deka brand battery to be an approved equal. Staff carefully analyzed the materials submitted by Batteries USA but found them insufficient to be able to determine whether the Deka Battery was capable of meeting each of the Technical Specifications. Staff, therefore, rejected Batteries USA's request for an approved equal.

Batteries USA then protested the District's rejection of its approved equal request but did not supply any additional information about its proposed battery, including its ability to meet the two year warranty specification. District staff thoroughly evaluated the issues raised in Batteries USA's protest letter, found no new information that would warrant a different conclusion, and notified Batteries USA of its determination to reject its protest.

Pursuant to the District's protest policy, I have independently reviewed the documents submitted by Batteries USA, staff's research regarding the sufficiency of Batteries USA's approved equal request, and staff's correspondence with Mr. Said Senan. I made the independent determination to support staff's recommendation to reject Batteries USA's bid protest and award Contract No. 2010-BT-3, *Heavy Duty Batteries*, to the lowest responsive, responsible bidder.

Batteries USA, through Mr. Said Senan, has notified the District that it intends to pursue its protest to the Board of Directors as outlined in District policy. Please note that the Board review of the protest is limited to the grounds for protest and evidence previously submitted to staff as part of the procurement process. The District Secretary has advised Mr. Said Senan of this process.

Attached for your information are (1) Batteries USA's approved equal request and supporting documentation; (2) Batteries USA's protest letter; (3) the District's response to Batteries USA's protest letter; and (4) the General Manager's final determination of Batteries USA's bid protest.

It is anticipated that a representative of Batteries USA will address the Board and staff will be available to respond with additional background as appropriate. In compliance with the District's procurement policy, the Board should consider the protest and staff's recommendation and then make a final determination regarding whether to reject or allow the protest. Upon Board action, a written statement of the reasons therefore should be included in the record. The award of the contract will not take place until the conclusion of the protest process.

BATTERIES USA INC.

One Industrial Street
San Francisco, CA 94124
Phone: 415-647-5575 Fax: 415-550-8226

August 30, 2009

Ms. Janet S. Tarantino
Secretary of the District
Golden Gate Bridge
Highway and Transportation District
Administration Building
Golden Gate Bridge Toll Plaza
San Francisco, CA 94124

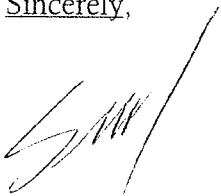
Re-Contract
No 2010 BT-3 Heavy Duty Batteries
Request: APPROVED EQUAL

BY FAX: 415-923-2013

Dear Ms. Tarantino,

Please see the attached letter.

Sincerely,



Said Senan

GOLDEN GATE BRIDGE
HIGHWAY AND
TRANSPORT DISTRICT
2009 AUG 32 PM 12: 26
SECRETARY OF
THE DISTRICT

BATTERIES USA INC.

One Industrial Street
San Francisco, CA 94124
Phone: 415-647-5575 Fax: 415-550-8226

August 30, 2009

Ms. Janet S. Tarantino
Secretary of the District
Golden Gate Bridge
Highway and Transportation District
Administration Building
Golden Gate Bridge Toll Plaza
San Francisco, CA 94124

Re-Contract
No 2010 BT-3 Heavy Duty Batteries
Request: APPROVED EQUAL

Dear Ms. Tarantino,

Please note the following:

1. Please see the attached two letters from East Penn MFG INC. Deka and Pay Land Corporation which is entirely owned distribution center by East Penn Deka
2. After we receive a copy of Golden Gate Bridge, High Way Transportation District's request for a bid for their transit buses from your good offices. We received it on Friday by Federal Express. We could not believe that East Penn Product/Deka appears to be excluded from this bid. All specifications required have been modified to reflect Interstate Batteries and only Interstate Batteries group 31-MHD, as the approved battery.
3. After receiving records we see no communication that Eat Penn Product/Deka or Batteries USA INC. failed in performing to and approve normal expectations and reasons as to why it is being excluded. Obviously, East Penn/Deka Products speak for itself by its level of performance. Given prudent opportunity, we do believe we can establish proper product for the application and bid accordingly.
4. Obviously, the Inter State 31-MHD is a good starting battery, when the application requires a pure starting unit. Historically Golden Gate has required as much reserve capacity demand as they do starting demand.
5. Interstate Starting Battery is significantly different than DEKA DPE31CS Battery which we have been supplying Golden Gate Transit and all other transit authorities for many years and we continue doing so.

6. Our DEKA DPE31CS has a coarse ground oxide designed for deep cycling. Which under constant charge and discharge will hold up longer than a thin plate starting battery. It also consists of having a special fiberglass separator used on the plates where it belongs.
7. For the record, 5 bus manufacturers mentioned in Golden Gate's Bid request, East Penn is the original equipment supplier to three of these manufacturers and they predominately use East Penn DP31CS or 7T31, both are Deep Cycle Batteries.
8. We ask your good offices to review your request for higher cold/and resume cranking AMP's Deep Cycle instead of Pure Starting Batteries.
9. Lastly, we ask your good offices to add our DPE31CS and/or 7T31 as an approved equal, which you have been using for your buses for many years. Doing so, both DPE31CS/7T31 would have been enough cycling characteristics to perform greatly.

Thank you for your consideration.

Sincerely,



Said Senan

EAST PENN manufacturing co., inc.



P.O. BOX 147, DEKA ROAD • LYON STATION, PA 19536-0147
PHONE: 610-682-6361 • FAX: 610-682-4781

Jeffrey H. Concannon
Western Division Sales Director
Branded Automotive Batteries
510-581-3608 Office
510-581-3148 FAX
510-909-5132 Cellular
jconcannon@dekabatteries.com

Date: August 27, 2009

Said Senan
Batteries USA
One Industrial Street
San Francisco, California 94124

Subject: Golden Gate Transit

Said,

I have reviewed the Golden Gate Bid Request and find the specifications requested perplexing.

Obviously the Interstate 31-MHD is a fine unit when the application requires a pure starting unit. Historically, Golden Gate has required as much reserve capacity demand as they do starting demands.

Prudent consultation would be to use a battery that would provide both Cold Cranking Amps and Reserve Capacity and Golden Gate would experience greater battery performance.

I would be more than hesitant to digress to a starting unit.

I recommend Deka Part Numbers DPE31CS and/or 7T31, both would have enough "Cycling" characteristics to perform admirably.

Good luck,
Jeff

19705 Michaels Court, Castro Valley, California 94546

**BAYLAND
BATTERY
CORPORATION**

967 Stockton Avenue
San Jose, CA 95110
(408) 294-5611
1-800229-5263

August 26, 2009

Mr. Said Senan
Batteries USA, Inc.
One Industrial Street
San Francisco, CA 94124

Dear Said:

Recently I received a copy of Golden Gate Bridge, Highway and Transportation District's request for bid for their transit buses. (Contract No. 2010-BT-3). I was quite surprised to see that Golden Gate has specified Interstate's 31-MHD as the approved battery. While I find the Interstate battery manufactured by Johnson Controls a good starting battery, this battery is significantly different than the battery you have been supplying Golden Gate.

The DPE31CS has a coarse ground oxide (designed for deep cycling) which under constant charge and discharge will hold up longer than a thin plate starting battery. Additionally the DPE31CS has a special fiber glass separator used on the positive plate which acts like rebar in cement to hold the active material on the plates where it belongs.

Said, of the 5 bus manufacturers mentioned in Golden Gate's bid request, East Penn is the original equipment supplier to three of these manufacturers, and they predominately use East Penn's DP31CS or 7T31, both deep cycle batteries.

I suggest in your conversations with Golden Gate that they should review their request for higher cold cranking amps (cca's) instead of a cycling battery which has proven successful at their own facilities.

If I can be of assistance, please let me know.

Sincerely,

Thomas J. Ryan



BATTERIES USA, INC

ONE INDUSTRIAL STREET
SAN FRANCISCO, CA 94124



Phone: (415) 647-5575 / 647-5261 Fax: (415) 550-8226

September 10, 2009

Ms Janet S. Tarantino
The Secretary of the District
Golden Gate Bridge
Highway and Transportation District
Administration Building
Golden Gate Bridge Toll Plaza
San Francisco Ca. 94129

By Fax at (415) 923-2013
and Federal Express

Dear Ms. Tarantino

Subject: Protest to Contract
No. 2010 BT-3 Heavy Duty
Batteries

Please note the following:

We are disputing the award of the above mentioned contract for the following reasons:

1. We were the successful bidder on the project of RTD contract No. MSE 2009-0001 which Golden Gate Highway and Transportation were participated on, our batteries we were bidding is DPE31CS which was tested and accepted before from your fleet and from other Transportation Agencies which you have been using for your buses for many years. (Please refer to our letter dated August 30, 2009 request for approved equals which our batteries made in America.)
2. Our batteries made in America and all the Transit Authorities requested buy America certificate including your good organization, we wonder if your good Offices changes that requirement.
3. Your good offices did not send us your bid request for one reason or another, until we find out about your bid from other sources, then we took the liberty to call your office and you were kind enough to send us the bid proposal.
4. We do feel that we were intentionally targeted and well planned from the Purchasing / Material etc to be excluded from bidding in the above-mentioned contract.
5. We believe that bad faith and unfair business practice committed from your Purchasing Dept and Material management without mentioning name at the present time.

SECRETARY OF
THE DISTRICT

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GOLDEN GATE BRIDGE
HIGHWAY AND
TRANSPORT DISTRICT

6. Although with our great respect to your good offices that it is the policy of the district to ensure nondiscrimination in the award of the contract, we are strongly believe that we have been discriminated by someone so as not to be awarded that contract.
7. Again and sadly we believe that actual fraud, and untrue accusation and conspiracy, has been committed by someone with unclean hands in your organization.
8. The cold hard reality is we tried to save your good office thousand of dollars by being fair and honest offering good products but instead we lost thousand of dollars when your good office withdraw from RTD Contract and here again they tried to put us out of business and to eliminate us from this contract and future contract

We suffered in silence until we reached a decision that enough is enough.

We thank you for your understanding

Sincerely

Said Senan



BY FACSIMILE AT (415) 550-8226 AND BY U.S. MAIL

September 15, 2009

Said Senan
Batteries U.S.A., Inc.
One Industrial Street
San Francisco, CA 94124

SUBJECT: CONTRACT NO. 2010-BT-3, HEAVY DUTY BATTERIES

Dear Mr. Senan:

The Golden Gate Bridge, Highway and Transportation District (District) is in receipt of your letter dated September 10, 2009, regarding Contract No. 2010-BT-3, *Heavy Duty Batteries*.

In your letter, you state that you are disputing the award of the Contract, and you provide a list of the reasons. However, this Contract has not yet been awarded. The bid opening for this Contract is scheduled for Tuesday, September 15, 2009, at 2:00 p.m. Our understanding from your letter is that your protest is based on the following allegations:

1. You disagree with the District's denial of your *Request for Approved Equals*. In particular, you understand that your battery is approved because it was an approved battery on a previous San Joaquin Regional Transit District (RTD) Contract, No. MSE 2009-009.
2. You question whether the Buy America requirement applies to this Contract.
3. You did not receive notification from the District regarding this Contract solicitation and, in general, feel that your firm was not treated fairly by the District.

Regarding your first concern, the District was not a party to the San Joaquin RTD Contract. Therefore, the fact that your firm's batteries were approved for that solicitation has no bearing on whether your firm's batteries may be approved for this District Contract.

Pursuant to Special Provision 1.6, *Approved Equals*, the Bidder must furnish, at its own expense, all test results, technical data, and background information required by the District in making the determination as to whether the proposed equipment is an approved equal. Further, pursuant to Special Provision 1.7, *Request for Approved Equals*, any *Request for Approved Equals* must be fully supported with technical data test results or other pertinent information as evidence that the substitute offered is essentially equal or better than that specified. When you informed District staff that you wanted to submit a bid for an unapproved product, staff explained to you that you

needed to follow the established process for *Request for Approved Equals*. In your *Request for Approved Equals*, you only supplied the District with testimonial letters and product cut sheets. These materials did not explain how your proposed product would conform to the District's *Technical Specifications*. Therefore, you did not provide enough evidence that the proposed product was equal or better than that specified. Accordingly, the District informed you, by letter of September 8, 2009, that your *Request for Approved Equals* was denied because the information provided by your firm was insufficient. Pursuant to Special Provision 1.6, *Approved Equals*, the District is the sole judge as to the comparative equality and suitability of the alternative product and its decision is final.

Regarding your second concern, this Contract is not federally-funded. Therefore, unlike the San Joaquin RTD contract with which you are familiar, the Buy America certificate and requirements are not required for this Contract.

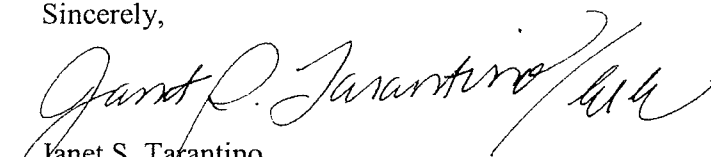
Regarding your third concern, the District is not legally required to notify vendors individually. The District is required to publish the *Invitation to Bid* for the Contract solicitation, which the District complied with. The District also posted the Contract solicitation on its procurement website. It is the responsibility of vendors to seek contract opportunities with the District.

Finally, we wish to assure you that it is the policy of the District to ensure nondiscrimination in the award and administration of all contracts. The process used for the solicitation of this Contract was in full accordance with District procedures.

We trust that this addresses your concerns, and we thank you for your participation in the District's solicitation.

Based on the analysis above, staff plans to reject your protest. Should you not agree with our conclusion, in accordance with the District's protest procedures, please notify me in writing of your intent to resubmit your protest.

Sincerely,



Janet S. Tarantino
Secretary of the District

JST:eie

c: T Mantony, G Walker, S Miller (Bus), N Gilardi, L Murray, A Caputo, G Jackson,
J Sherman and M Chun (by electronic mail only)

BY FACSIMILE AT (415) 550-8226 AND BY U.S. MAIL

October 8, 2009

Mr. Said Senan
Batteries U.S.A., Inc.
One Industrial Street
San Francisco, CA 94124



SUBJECT: CONTRACT NO. 2010-BT-3, HEAVY DUTY BATTERIES

Dear Mr. Senan:

In accordance with the Golden Gate Bridge, Highway and Transportation District's (District) bid protest policy, I have undertaken a thorough review of the bid process for Contract No. 2010-BT-3, *Heavy Duty Batteries*, including an analysis of (1) the documents provided by your firm in support of your bid protest and (2) District staff's evaluation of the issues raised in your bid protest letter and staff's recommendation to reject your bid protest.

As a background, the District issued the above referenced Invitation for Bids on August 11, 2009. The specifications called for the provision of an Interstate brand battery or approved equal. Batteries USA submitted a request for a Deka brand battery to be an approved equal. This request included testimonial letters and product cut sheets, but did not explain how the Deka battery would meet the required Technical Specifications. Staff carefully analyzed the materials submitted, but found them insufficient to be able to determine whether the Deka Battery was capable of meeting each of the Technical Specifications. On September 8, 2009, staff therefore rejected Batteries USA's request for an approved equal. The reason given for rejection was that Batteries USA had not provided sufficient information to enable the District to determine whether or not the Deka Battery met the Technical Specifications.

By letter dated September 10, 2009, Batteries USA protested the District's rejection of its approved equal request but did not supply any additional information about its proposed battery, and raised a number of other unrelated complaints. District staff thoroughly evaluated the concerns raised in Batteries USA's protest letter and concluded they were without merit. The District addressed all of Batteries USA's concerns and notified Batteries USA of its determination to reject the protest by letter dated September 15, 2009. Batteries USA informed the District of its intent to further protest the District's determination, but again did not submit any supporting documentation that demonstrated its proposed battery met the District's technical requirements.

Special Provisions 1.6 and 1.7 of the Bid Documents clearly states that any request for an approved equal must be "fully supported with technical data test results or other pertinent information as evidence that the substitute offered is essentially equal or better than that specified in the Contract Documents." In addition, "the District shall be the sole judge as to the comparative equality and suitability of alternative equipment, articles, material, or process, and

its decision shall be final.” Under the terms of the Invitation for Bids, the District had the discretion to reject any approved equal request that did not demonstrate that the proposed product was equal or better to that specified in the Invitation for Bids. As the above record indicates, Batteries USA did not meet this requirement.

Additionally, despite Batteries USA’s failure to provide the required information, independent staff research revealed that there were a number of areas in which the Deka battery did not meet the technical requirements stated in the Invitation for Bids, including, but not limited to, exterior case dimension requirements, reserve capacity requirements and performance warranty requirements.

Therefore, I have made the determination to support staff’s recommendation to reject Batteries USA’s bid protest and award Contract No. 2010-BT-3, *Heavy Duty Batteries*, to the lowest responsive, responsible bidder. I wish to assure you that I have fully and fairly evaluated all of the issues raised in your bid protest letter and subsequent notice of appeal.

Pursuant to the District’s protest policy, previously provided to you by the District’s Secretary on September 9, 2009, we consider this written determination to be the District’s final decision on this matter. Thank you for your interest in this Contract - I wish to encourage your participation in future District solicitations that may arise and be of interest to your firm.

Sincerely,



Celia G. Kupersmith
General Manager

c: J. Tarantino
T. Mantony
G. Walker
S. Miller
N. Gilardi
L. Murray
A. Caputo
M. Chun, Hanson Bridgett
J. Sherman, Hanson Bridgett