

4076

03908

DECISION



R. Klemm
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE **B-188659** **DATE: October 5, 1977**

MATTER OF: **Austin-Campbell Co.--Reconsideration**

DIGEST:

On reconsideration of prior decision, since no error of fact or law has been shown, claimant's request for bid preparation costs is again denied.

In Austin-Campbell Co., B-188659, August 9, 1977, 77-2 CPD 99, we denied a claim for bid preparation costs.

The Department of the Navy issued an invitation for bids for the procurement of cold storage equipment including compressors having a piston speed of 875 fpm or less and direct drive motors of 1750 rpm. Prior to bid opening, 10 vendors indicated that they could meet the requirements and would bid. Carrier International Corporation (Carrier), however, advised the Navy 3 days before bid opening that its equipment could not meet the specified 875 piston speed limitation, inter alia, and it would not bid, which was confirmed by letter of the same date to the Navy.

The Navy awarded the contract to the low responsive and responsible bidder. Subsequent to award, the Navy determined that the awardee could not provide compliant equipment. The Navy contacted compressor manufacturers in an attempt to ascertain if compliant compressors were commercially available. The compressor manufacturers informed the Navy that in view of the interdependent piston and motor speed requirements, they could not supply compliant equipment. Since commercially available compressors could not meet the Government's specifications, the Navy determined that the specifications were impossible of performance and, consequently, modified the specifications so that the awardee could provide compressors with a 1000 fpm nominal piston speed.

Austin-Campbell Co. (Austin-Campbell) had alleged that a Navy engineer orally waived the requirement for direct drive 1750 rpm motors with respect to a compressor made by York Division,

Borg Warner, but not with respect to Carrier compressors upon which the low bid was apparently based. We found no evidence of record of any such waiver by amendment. Moreover, since paragraph 3 of Standard Form 33A, Instructions and Conditions, included in the IFB, specifically states that oral explanations given before award of a contract are not binding, bidders assume the risk by relying on oral advice provided prior to award. Deere & Company, B-189136(1), June 28, 1977, 77-1 CPD 450. The Navy apparently believed both prior to award and for some time thereafter that the specified equipment was commercially available, and there was no showing that the Navy awarded the contract with the intention of modifying the specifications shortly after award. Considering Carrier's prebid opening letter and the post-award statements by manufacturers of cold storage equipment that compliant equipment was not commercially available, there was no basis for determining that the Navy improperly modified the contract to the derogation of Austin-Campbell's rights as a competitor. We recognized the record's failure to explain the inconsistencies between the before-and-after bid opening statements regarding specification compliance.

Austin-Campbell requests that we reconsider the claim for bid preparation costs for the following reasons:

1. GAO did not conduct a thorough investigation to determine whether a Navy engineer had granted Austin-Campbell and others an oral waiver of the 1750 rpm motor requirement.
2. The contracting officer gave a Navy engineer authority to grant an oral waiver of specifications. The oral waiver of specifications was binding on the Navy.
3. Although GAO relied heavily on Carrier's prebid-opening letter in finding for the Navy, GAO did not conduct a thorough investigation to determine the meaning of the letter. There is nothing in the letter which says that Carrier does not make compressors which meet the specifications. The Navy should have required the awardee to provide a compressor meeting all of the specifications since Carrier manufactures a compliant unit.

B-188559

Since allegation 1 was considered in our prior decision, and our disposition of the matter has been summarized above, no further discussion of the matter is warranted.

There was and is no evidence in the record before us to support allegation 2. In fact, the Navy denied that any oral waiver of specifications was granted. In any event, while a contracting officer may specifically authorize others to discuss technical matters with prospective contractors, so significant a matter as waiver of specification requirements could only be accomplished by proper amendment. See Armed Services Procurement Regulation §§ 2-208, -211 (1976 ed.).

With regard to allegation 3, Carrier categorically states, not once but twice in its letter, that it could not supply compliant equipment and would not bid. We continue to find this persuasive dispositive evidence. Considering Carrier's prebid-opening letter and the post-award statements of compressor manufacturers that compliant equipment was not commercially available, we again cannot find impropriety in the Navy's not requiring the awardee to provide equipment which met the specifications.

Since there has been no showing that our decision to deny Austin-Campbell's request for bid preparation costs was in error as a matter of fact or law, our decision is affirmed.

Deputy

W. K. ...
Comptroller General
of the United States