

DECISION



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

10, 442

FILE: B-194334

DATE: June 13, 1979

MATTER OF: Cathey Enterprises, Inc.

Protest of Bid Rejection Based on Bid Sample Being Determined Noncompliant

DIGEST:

- 1. Where protester tested its bid sample after rejection and found it compliant with listed evaluation characteristic, conflict regarding test results must be resolved in favor of the agency finding in absence of showing that agency's test was defective, improperly conducted, or that results were erroneously reported.
- 2. Where low bidder's bid sample was determined noncompliant with listed sample evaluation characteristic and solicitation required rejection of bid for such nonconformity, defect may not be waived or cured after bid opening; therefore low bid was properly rejected as nonresponsive.

DLG 01787

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Cathey Enterprises, Inc. (Cathey) protests the rejection of its low bid for police leather uniform *holsters* items under Marine Corps invitation for bids No. M00027-79-B-0010. Cathey's bid was rejected when one of its bid samples for holsters failed to hold the revolvers specified by the invitation. Cathey contends that the rejection of its bid was wrong since it tested the sample holster after it was returned by the agency and the revolvers fit. Cathey therefore requests termination of the contract awarded to a higher-priced bidder and award to it.

The invitation solicited bids for five items on a brand name or equal basis, and provided that a single award would be made for all items. The invitation further provided that submission of a bid sample was required for "or equal" bids.

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As required by the standard "brand name or equal" clause set out in the bid schedule, each of the five brand name items was accompanied by a list of "salient characteristics" considered essential to the minimum needs of the Marine Corps. The solicitation further advised bidders that such salient characteristics would be utilized for evaluation purposes to determine whether "equal products," offered as an alternative to the brand name products, were in fact "equal." The solicitation also included a clause entitled "Bid Samples (1974 APR)" which stipulated not only that bid samples, wherever required, would be tested to determine compliance with all characteristics listed for evaluation [i.e., the salient characteristics referenced above], but that failure of samples to conform to all such characteristics would require rejection of the bid.

Item 0002 specified a "Police Uniform Holster, Bianchi Leather Products Model #99T or EQUAL," and set forth five salient characteristics to which alternative products were required to conform in order to be considered "equal" to the specified Bianchi model. The protest centers on the following characteristic:

" * * * * *

5. The holster must accommodate the .38 caliber Smith & Wesson Model 10 revolver (4" barrel) and the .38 caliber Sturm-Ruger Service - Six Military Model revolver (4" barrel).

Cathey's bid offered its model LHW (SL) 1054 holster as an "equal" product. However, its bid was rejected as nonresponsive because the Marine Corps determined that the sample Cathey holster would not accommodate the specified weapons as the thumbbreak strap would not fasten with the revolver in place.

Cathey asserts that approximately one week after being notified by telephone that its sample was rejected the sample was returned in a box which was not opened. The protester reports that several days later a Defense

Contract Administration Services Quality Assurance Representative (QAR), on a regular inspection trip, was requested to open the box and try the revolver for fit in the holster. Cathey states that when a replica Smith & Wesson Model 10 was placed in the holster and the strap snapped, "the fit was tight as well as the strap which is common with unused leather products." Nevertheless, Cathey believes the fit to have been "sufficient" and that there were not adequate grounds to reject the sample. Cathey further advises that on the following day, its president and the QAR visited a "shooting center" where the holster in question was tried for fit with a Ruger Security Six, four inch barrel as well as the Smith & Wesson model and both revolvers fit in the holster and the retainer strap snapped into position. The agency reports that it contacted the QAR and verified Cathey's assertion that the sample holster successfully accommodated a replica Smith & Wesson revolver upon its removal from the sealed box.

The Marine Corps' report includes sworn affidavits from the four member panel that evaluated the bid samples. In the affidavits each member asserts that the Cathey holster would not accommodate either of the specified revolvers because the thumb-break could not be fastened around either weapon.

In matters concerning the evaluation of bid samples, we have taken the position that since procurement officers are better qualified than this Office to evaluate the sufficiency of offered products and to determine whether they meet a solicitation's requisite characteristics, we will not substitute our judgment for that of the contracting agency unless the record establishes that such judgment was without a basis in fact, or that samples were not fairly and conscientiously evaluated in accordance with the requirements of the purchase description. Airways Industries, Inc. et al., 57 Comp. Gen. 686, 694 (1978), 78-2 CPD 115.

Since the affidavits state that the Cathey holster was tested by three different members of the evaluation panel with the same result, and that result was confirmed

by the affidavit of the fourth member who witnessed the tests, we have no basis to conclude that the holster was not evaluated fairly or conscientiously in accordance with the listed characteristic.

We are unable to account for the conflicting results of the respective tests performed on the holster. Notwithstanding that tests performed by a protester on its bid sample may produce a different result from those performed by an agency, we have stated that the mere existence of such a factual dispute is insufficient to nullify the agency's finding without a showing that the Government's test was in some way defective or improperly conducted, or that the results were erroneously reported. 51 Comp. Gen. 583, 585-586 (1972). No such showing has been made here.

In addition to its position that its holster is able to accommodate the specified revolver, Cathey argues that even if the agency could conclude that the revolvers would not fit, that should not require rejection of the bid because "minor manufacturing procedures" would correct any existing defect. We find no merit to this proposition. Where a brand name or equal purchase description sets forth salient characteristics and provides that bids offering "equal" products must fully meet the salient characteristics listed in order to be responsive, we have held that these particular features must be presumed to be material and essential, and award may not be made to a bidder whose sample did not conform in all respects to such features. S. Livingston & Son, Inc., B-183820, September 24, 1975, 75-2 CPD 179. Accordingly, failure of a sample holster to comply with any of the five listed evaluation characteristics would mandate a bid's rejection, and the nonconformity may not be waived as a minor informality or cured after bid opening.

The protest is denied.


Deputy Comptroller General
of the United States