

# DECISION



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

28131

FILE: B-213295

DATE: May 1, 1984

MATTER OF: Jarrett S. Blankenship Co.

## DIGEST:

1. Agency acted improperly in accepting bid which did not include required descriptive data based on bidder's oral assurance that item offered met specification requirements.
2. Where specifications require air conditioning unit to meet particular dimensions, it is questionable whether units which do not meet those dimensions but which can be made to fit existing openings through use of mounting brackets properly may be accepted.
3. A bidder is not entitled to recovery of bid preparation costs where it was not entitled to contract award.

Jarrett S. Blankenship Co. protests the award of a contract for 20 air conditioning units to Brothers Supply Corporation under invitation for bids (IFB) No. DTFA07-83-B-00136, issued by the Federal Aviation Administration (FAA). Blankenship contends that the agency improperly rejected its bid and asks that it be awarded the contract or, alternatively, be permitted to recover \$2,000.

We sustain the protest but deny the claim.

The solicitation called for bids for 20 Friedrich Model EL24F35 air conditioners on a brand name or equal basis. It required that bidders offering other than the brand name unit submit the manufacturer's name and model or catalog number along with descriptive literature. The solicitation contained the following notice:

"The 20" x 28" outside case dimension is a critical requirement as air conditioner must fit existing opening in concrete and/or block building walls and no other size will fit." (Underlining in original.)

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The FAA received and opened seven bids on September 15, 1983. Fedders Corporation's low bid of \$525 per unit was rejected as nonresponsive because it offered a Fedders Model AEL 24E7HK with dimensions of 18-1/4" x 26". Blankenship, the second low bidder at \$699 per unit, offered Carrier Model 51 FVA-323-301 with dimensions of 18-1/2" x 26-1/2". The bid was also rejected as nonresponsive. The third low bidder, Brothers Supply Corporation, offered Emerson Model 24JC4H at \$700 each and although it submitted no descriptive literature, received the award based on oral assurances that its unit would meet the required dimensions. Friedrich, the fourth low bidder, offered the specified brand name product. The FAA states that it discovered after taking delivery and making final payment that the unit offered by Brothers had outside dimensions of 18-5/8" x 26-3/4" and thus also did not conform to the dimensions required by the solicitation.

Blankenship protests the award of the contract to Brothers on the ground that its bid met the specifications and was lower. The protester contends that its bid met the specifications because the unit it offered, like that offered by Brothers, was equipped with mounting brackets enabling it to fit the existing wall openings. The FAA concedes that the contracting officer improperly awarded the contract to Brothers and agrees with the protester that its unit met the IFB size requirements. It maintains, however, that the protest should be denied since Blankenship was the second low bidder and not eligible for award. The FAA's position appears to be that the units could not exceed the stated dimensions, but that they could be smaller if they could be made to fit the existing openings through the use of brackets. Implicit in the FAA's position is that the low bidder's unit met that requirement.

In most instances, where a bidder, such as Brothers, fails to submit with its bid data required by the solicitation to determine whether an "or equal" item conforms with the specification that bid must be rejected as nonresponsive. Vista Scientific Corporation, B-210416, April 5, 1983, 83-1 CPD 365. While in certain circumstances descriptive data submitted after bid opening may be considered, Data-Chron, Inc., B-196801, July 29, 1980, 80-2 CPD 78, it was clearly improper for the FAA to have accepted Brothers' "or equal" unit based on that firm's oral representation without reviewing any data at any time prior to award.

Further, while it may have been the agency's intent to accept any unit which could be made to fit the existing openings with the use of brackets or other spacing devices, the solicitation clearly required an acceptable unit to have outside case dimensions of 20" x 28". It did not state, as the FAA implies, that these dimensions must be 20" x 28" or less. Therefore, we think it is questionable whether any of the three low bids here properly could be accepted as responsive to the specifications. However, even if it were proper, Blankenship, as the second low rather than the low bidder, would not have been in line for award.

Because the contracting officer improperly accepted the Brothers bid, we sustain the protest. It is not practicable for us to recommend remedial action, however, as the units have been delivered and accepted. We deny Blankenship's claim for \$2,000 for bid preparation costs since Blankenship was not entitled to award and therefore is not entitled to recovery of its bid preparation costs. Jarrett S. Blankenship Co., B-213294; B-213294.2, April 2, 1984, 84-1 CPD \_\_\_\_.

By letter of today, we are bringing the matter to the attention of the Secretary of Transportation.

*Larry D. Van Cleave*  
for Comptroller General  
of the United States