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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cagle Welding & Equipment, Inc.

File: B-247199

Date: April 10, 1992

Steve Fraker for the protester.
Eric A. Lile, Esq., and L. James Gardner, Esq., Department of the Navy, for the agency.
Tania L. Calhoun and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid offering an "equal" product under brand name or equal procurement for waste compactors was properly rejected where the bidder did not submit descriptive literature with the bid on the offered "equal" model, but rather submitted descriptive literature on another model.

DECISION

Cagle Welding & Equipment, Inc. protests the cancellation of invitation for bids (IFB) No. N68836-91-B-0256, issued by the Department of the Navy, Naval Supply Center, Jacksonville, Florida, for waste compactors. Cagle argues that its bid was improperly rejected as nonresponsive; therefore there was no compelling reason to cancel the solicitation.

We deny the protest.

The IFB was issued on November 1, 1991, as a total small business set-aside and solicited bids, on a "brand name or equal" basis, for seven Marathon Equipment Company waste compactors, part number RJ-225S, or equal. The IFB listed several salient characteristics for the waste compactors, and required the submission of all descriptive materials necessary for the agency to determine whether the product offered met those salient characteristics. In addition, bidders were required to certify that all end items to be furnished would be manufactured or produced by a small business concern.

Prior to bid opening, the Navy received a letter dated November 27 from a Marathon distributor stating that bidders were precluded from offering the brand name product on this

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[Protest of No. 6-11 of S. H. Brown & Co.]

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small business set-aside procurement because Marathon was not a small business. The agency states that because there was insufficient time to act on this information, it proceeded to open the nine bids it received on the scheduled opening date of December 2. Cagle, which bid an "equal" product, was the apparent low bidder, with a total bid of \$32,340.

After bid opening, the agency performed an evaluation based on the descriptive literature furnished by the bidders with their bids to determine if the waste compactor offered by each bidder met the salient characteristics listed in the IFB. In the course of the evaluation, the Navy confirmed that Marathon was not a small business and that, as a result, none of the four bidders offering the Marathon brand name product was responsive.¹

The Navy also determined that three of the five bidders offering "equal" products, including Cagle, had provided descriptive literature describing a waste compactor that was not responsive to the salient characteristic requiring that the item have a total maximum force of 52,300 pounds.² Cagle's bid offered as an "equal" product the Cagle Welding model No. C-2556-LC; however, Cagle's descriptive literature described the Cagle Welding model No. C-2556, which has a total maximum force of 53,000 pounds. Because this characteristic differed from the salient characteristic of a total maximum force of 52,300 pounds, Cagle's bid was rejected as nonresponsive.³

¹Where a bid on a small business set-aside fails to establish the bidder's legal obligation to furnish end items manufactured or produced by a small business concern, the bid is nonresponsive and must be rejected; otherwise a small business contractor would be free to provide the end items from either small or large businesses as its own business interests might dictate, thus defeating the purpose of the small business set-aside program. Propper Mfg. Co., Inc.; Columbia Diagnostics, Inc., B-233321; B-233321.2, Jan. 23, 1989, 89-1 CPD ¶ 58.

²The other two bidders offering "equal" products were found nonresponsive for other reasons.

³The remaining two bids were rejected as nonresponsive for similar reasons. The agency states that Cagle's descriptive literature also indicated nonconformance with the weight and hydraulic pump specifications. We need not consider those issues since we find that Cagle's bid properly was found nonresponsive based on nonconformance with the total maximum force requirement.

Since the Navy determined that all of the bids were nonresponsive, an amendment was issued on December 23 canceling the solicitation and advising that the requirement would be resolicited.

Federal Acquisition Regulation (FAR) § 14.404-1 provides that a solicitation may be canceled before award but after bid opening if there is a compelling reason to do so; FAR § 14.404-1(c)(8) specifically states that a compelling reason exists where no responsive bids have been received. Here, Cagle protests that its bid was improperly rejected as nonresponsive, and the Navy therefore did not have a proper basis upon which to cancel the solicitation.

Concerning the responsiveness of its bid, Cagle admits that the descriptive literature it submitted described a model other than the model offered, and that the submitted literature shows a maximum force which differs from the salient characteristic. Cagle argues that, despite the descriptive literature, its product meets and exceeds the IFB specifications. According to Cagle, waste compactor systems have relief valves with pressure adjusters to allow the compactor user to adjust the pressure generated by the system. Cagle states that on its product the pressure can be adjusted from 6,000 to 90,000 pounds using the components specified in the IFB; while its descriptive literature shows a total maximum force of 53,000 pounds, Cagle can adjust the relief valve pressure to accommodate the IFB requirement of 52,300 pounds.

To be responsive to a brand name or equal solicitation, bids offering "equal" products must conform to the salient characteristics of the brand name product listed in the solicitation. Where, as here, descriptive literature is required to establish the bid's conformance with the specifications, and bidders are so cautioned, the bid must be rejected as nonresponsive if the literature submitted fails to show clearly that the offered product conforms to the specifications. JoaQuin Mfg. Corp., B-228515, Jan. 11, 1988, 88-1 CPD ¶ 15.

Here, Cagle's bid for its model No. C-2556-LC was accompanied solely by literature for its model No. C-2556. In its bid, Cagle failed to provide any explanation of this discrepancy, such as distinctions or similarities between the two models. Since the acceptability of the equal item was to be determined on the basis of descriptive literature submitted with the bid, and since the material submitted by Cagle described a model which differed from the offered model, the agency could not reasonably determine that the

offered model was the one described in the required descriptive literature and properly rejected the bid as nonresponsive. See Sharp Elecs. Corp., B-242302, Apr. 15, 1991, 91-1 CPD ¶ 374.

Cagle now states that model No. C-2556 is its standard model machine and that the descriptive literature Cagle submitted describes that model's general specifications concerning its construction and performance. With regard to the model actually bid on, model No. C-2556-LC, Cagle states that the "LC" designates a machine which differs from the standard machine and meets the specifications required in this IFB. Cagle's post-bid explanation is an attempt to cure the nonresponsiveness of its bid; however, nonresponsiveness cannot be cured after bid opening, as that would be tantamount to allowing the bidder to submit a new bid. Trail Equip. Co., B-241004.2, Feb. 1, 1991, 91-1 CPD ¶ 102.

Cagle further argues that its signature on the bid binds it to provide a product meeting the IFB specifications upon award of a contract, despite the information contained in the descriptive literature. The purpose of the requirement that bidders submit descriptive literature in a brand name or equal procurement is to ensure that products offered as equal to the brand name equipment in fact conform to the salient characteristics listed in the solicitation; if conformance is not shown, the bid must be rejected. Id. A bidder's blanket statements of compliance, such as a notation on the bid stating that "this is an equal to the equipment specified," or the bidder's belief that its product is functionally equal to the brand name product, are not enough; rather, the bidder must affirmatively demonstrate the equivalency. AZTEK, Inc., B-229897, Mar. 25, 1988, 88-1 CPD ¶ 308. If the bidder does not do so, its bid is nonresponsive. Here, Cagle did not affirmatively demonstrate the equivalency between the brand name product and its offered product because the literature it submitted described a model other than the one it offered.

Since Cagle's bid was properly rejected as nonresponsive, and no other responsive bids were received, the agency acted properly in canceling the solicitation. FAR § 14.404-1(c)(8). As to Cagle's argument that resolicitation will create an impermissible auction, the mere fact that prices have been exposed does not preclude cancellation and resolicitation. Resolicitation does not create an impermissible auction where, as here, the original post-bid

opening cancellation of an IFB was otherwise proper.
Duracell, Inc.; Altus Corp., B-229538 et al., Feb. 12, 1988,
88-1 CPD ¶ 145.

The protest is denied.

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for James F. Hinchman
General Counsel