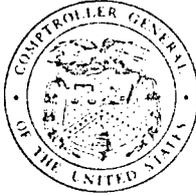


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DECISION



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

60642

FILE: B-183797

DATE: March 16, 1976

MATTER OF: Pauli & Griffin Company, Inc.

98482

DIGEST:

1. Agency properly rejected bid where neither list of accessories contained in bid nor bidder's accompanying descriptive literature indicated that required accessory would be furnished along with machine offered by bidder.
2. Protest regarding propriety of Government's acceptance of allegedly defective bid is untimely since bid was available for public examination after bid opening and protest was not raised within five days after notification of the basis for protest, that is, the Government's acceptance of allegedly defective bid. Moreover, record shows no basis to object to acceptance of nozzles of different composition than brand name item.

Pauli & Griffin Company, Incorporated (P&G), has protested the award made to the P.R. Lindsay Company, Incorporated (Lindsay), under solicitation No. DAAA09-75-B-6470, issued December 6, 1974, by the United States Army Armament Command, Rock Island, Illinois, for abrasive blast cleaning machines on a "brand name or equal" basis.

The brand name item was identified as the Sanstorm Manufacturing Company (Sanstorm) model No. EW with related equipment comprised of a helmet, gloves, hose and coupling assembly, one each of three specific nozzles identified as the Sanstorm Nos. CNT-6, CNT-7 and CNT-8 or equal. The five bids received were based on various offered "equal" products. The three lowest bids were rejected for failure to comply with the brand name or equal specification. P&G's bid, the third lowest, was determined to be nonresponsive because it did not indicate that a nozzle holder would be furnished.

The IFB incorporated the standard brand name or equal provision in Armed Services Procurement Regulation (ASPR) 7-1003.10 (1974 ed.). The clause informs bidders, in part, that the Government's determination of the equality of the offered product will be based on information furnished by the bidder, identified in the bid, or otherwise reasonably available to the purchasing activity. It provides that equal products will be considered for award if they are clearly identified in the bids and the Government determines that they meet the salient characteristics stated. The solicitation provided, as required by ASPR 1-1206.3(a), an appropriate space for bidders to insert the manufacturer's name, brand and number of the item offered. Unless bidders indicated the offering of an equal product, the standard clause provided that the bid would be considered as offering a brand name product. In addition, the clause explicitly required the bidder to submit descriptive materials such as cuts, illustrations, drawings or other information necessary to determine whether the product offered as an equal meets the salient requirements of the IFB and to establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award.

The protester contends that its bid in fact included an appropriate, superior nozzle holder and was therefore responsive. This contention is based on assertions that: (1) the appropriate nozzle holder is included in the part number for the offered nozzle; (2) that common sense would dictate the conclusion that no responsible seller would provide the equipment without an appropriate nozzle holder; (3) that nozzle holders were available in the P&G catalog submitted with its bid and therefore a determination of equality could and should have been made; and (4) that at the least, P&G's bid should be interpreted as offering the brand name nozzle holder.

The question of the responsiveness of a bid concerns whether a bidder has unequivocally offered to provide the requested items in total conformance with the terms and specification requirements of the invitation. This determination must be made from the bid documents as of the time of bid opening or, as is appropriate in this case, from reference to published commercial literature which was publicly available prior to bid opening. See B-178377, July 25, 1973; 50 Comp. Gen. 8 (1970). The procuring activity determined that the P&G bid did not conform to the IFB requirements because neither the bid nor the accompanying descriptive literature (catalog) indicated that a nozzle holder was to be furnished with the offered equipment. P&G's bid indicated it was bidding on its own equipment as equal to the brand name and with the exception of the nozzle holder it listed all the P&G components to be furnished. In this

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connection we note that, contrary to the argument by the protester, the catalog accompanying P&G's bid provides no indication that nozzle holders are included in the part numbers for nozzles. Nozzle holders are depicted on a separate page in P&G's catalog as accessories with independent part numbers and alphanumeric description. Also, while sand blast hoses, nozzles and nozzle holders were shown as included with some models, there was no such indication in the literature describing the P&G model offered in this case that these accessories were included with the machine model in question. We therefore are of the opinion that P&G's bid is at best ambiguous regarding the inclusion of a nozzle holder.

The protester also contends that its bid should be considered as offering the brand name nozzle holder since the standard brand name or equal clause provides for such consideration where the bid does not clearly indicate that an "equal" product is offered. We think the standard clause does not contemplate the instant circumstances and that it would be unreasonable to construe P&G's bid as offering the brand name nozzle holder. It is, at best, unlikely that a bidder would furnish an integral component of another manufacturer where, as here, that bidder has bid the basic equipment and all other components of its own manufacture.

The protester also cites our decision B-153717, June 4, 1964, for its discussion of an analogous omission which we considered a minor deviation from purchase description requirements where the cost of the omitted item was negligible. That decision, however, may be distinguished from the present matter on the basis that the item there omitted was not actually necessary to meet the Government's minimum needs, whereas in this case the entire blasting apparatus is nonfunctional without the omitted nozzle holders.

In these circumstances, we conclude that the agency's rejection of P&G's bid as nonresponsive was reasonable.

The protester has questioned the propriety of the award to Lindsay on the basis of several deficiencies apparent in its bid. It objects primarily to the fact that Lindsay was determined responsive even though it offered ceramic nozzles (50 each) for each of the two brand name tungsten carbide nozzles specified. The protester characterizes this fact as "astounding" considering that ceramic nozzles "have an approximate useful life of only 4 hours" compared to the average life of between 250 and 800 hours of a tungsten carbide nozzle. It states that the ceramic nozzle is "accepted in the industry, supplier and user alike, as junk."

This matter, however, was first raised by the protester in its letter of July 22, 1975. Our Interim Bid Protest Procedures and Standards, 4 C.F.R. 20.2(a) (1975), applicable to this protest, required that protests be filed not later than five days after the basis for the protest is known or should have been known. Since the bids were available after opening for public examination pursuant to ASPR 2-402.1, it is our opinion that P&G should have questioned the deficiencies in Lindsay's bid within five days after the Government acted to accept the allegedly deficient bid. Accordingly, we find these arguments untimely.

Nevertheless, in view of the seriousness of the allegation regarding the Lindsay nozzles we requested the Army to comment on the matter. A reply was received stating as follows:

"In August 1975, P&G's rebuttal was submitted for technical comment, specifically the ceramic versus tungsten composition of the equipment. In effect, the response was that the material composition of the item was not specified as a salient characteristic. The composition was left to the manufacturer's design. Further, there has been no feedback from field usage expressing any preference for either the ceramic or the tungsten material; although physically, tungsten will last longer.

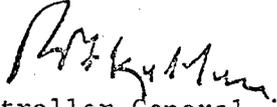
"As regards the salient characteristics of the 'accessories' to the sand blasting machine, we refer you to Section F of the solicitation (TAB 1, p. 20). The equipment, i.e. accessories, required to accompany the main body of the machine are per se the salient characteristics. We also refer you to the Brand Name or Equal requirements of the solicitation (TAB 1, p. 16), subsection (c), which mandates a bidder to submit descriptive material to insure that sufficient information is available to determine the 'equality' of other than the brand name item.

"Our position, as stated in the 2 July 1975 submission to your Office, is that the equipment offered by P&G could not be determined to be 'equal' to the brand name item. Essentially, the descriptive material submitted by the firm was ambiguous; and under the appropriate decisions of your Office, the procuring activity's rejection of the bid was proper."

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Since, as the Army states, the IFB did not list the material composition of the item as a salient characteristic, we find no basis to question the contracting officer's determination that Lindsay's nozzles met the requirements of the IFB.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States