

DECISION

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

FILE: B-185664

DATE: May 26, 1976

MATTER OF: Cummins Mid-America, Inc.

DIGEST:

Where IFB solicited "brand name or equal" product but goes beyond make and model of brand name and specifies particular design features, such features must be presumed to have been regarded as material and essential to needs of Government. Contract was improperly awarded to bidder nonresponsive to certain of these features. Since award was made to nonresponsive bidder and IFB was defective for listing characteristics not essential to needs of Government as evidenced by award, recommendation is made that contract be terminated for convenience of Government and procurement readvertised reflecting only actual needs.

The Department of Justice (Justice), Bureau of Prisons issued invitation for bids (IFB) No. 132-8840-L for a 450-kilowatt diesel-engine-driven electrical generating plant--"Cummins Engine Company, Inc., Caterpillar or Onan" or "approved equal." Bids were opened and award was made to Dobbs Detroit Diesel, Inc. (Dobbs), at a price of \$43,897.

Cummins Mid-America, Inc. (Cummins), which bid \$44,367, protests the acceptance of Dobbs' bid, in part, on the basis that the diesel engine offered by Dobbs as an "equal" does not comply with the specification requirements contained in the IFB for wet-type, removable cylinder liners and water-cooled exhaust manifold.

Justice has conceded that the Dobbs diesel engine deviates from the above requirements. However, its position is that the Dobbs diesel engine complied with the performance requirements of the IFB and, therefore, qualified as an approved "equal" to the listed brand names notwithstanding the failure to meet every detail of the specifications. Justice relies on the following language in the specifications: "Materials shall be new, of such quality, capacity and type and size to assure the complete system operating satisfactorily."

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The last sentence of paragraph (a) of the "brand name or equal" clause contained in the IFB reads as follows:

"* * * Bids offering 'EQUAL' products will be considered for award if such products are clearly identified in the bids and are determined by the Government to be equal in all material respects to the brand name products referenced in the INVITATION FOR BIDS." (Emphasis supplied.)

However, Federal Procurement Regulations (FPR) § 1-1.307-6(a)(2) (1964 ed. amend. 139) provides in the last sentence of paragraph (a) of the clause:

"* * * Bids offering 'equal' products * * * will be considered for award if such products are clearly identified in the bids and are determined by the Government to meet fully the salient characteristics requirements listed in the invitation." (Emphasis supplied.)

Although we are recommending that the Attorney General take steps to assure that the correct FPR clauses are included in future solicitations, the variance in languages makes no difference here. See Business Equipment Center, Ltd., B-184583, November 6, 1975, 75-2 CPD 284.

The question to be resolved is whether the deviations in the Dobbs bid were material. The IFB, in addition to listing brand names, detailed the design and performance characteristics of the procured item.

The drafting of proper "brand name or equal" purchase descriptions which set forth essential characteristics to meet the requirements of the Government is a matter primarily within the jurisdiction of the contracting agency. However, where, as here, the contracting agency in a "brand name or equal" solicitation goes beyond the make and model of the brand name and specifies particular features, we have held that such features must be presumed to have been regarded as material and essential to the needs of the Government. S. Livingston & Son, Inc., B-183820, September 24, 1975, 75-2 CPD 179.

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The following statement from S. Livingston & Son, Inc., supra, involving an award to a bidder offering a product deviating from salient characteristics listed in a "brand name or equal" purchase description, is applicable to the instant situation:

"Concerning Smithsonian's indication that the deviations contained in Setlow's sample were minor and did not affect the shirt's suitability, if this were the case, such features should not have been listed as salient characteristics of the brand name item in the specification. This action, we feel, may have misled other bidders into believing such features were mandatory and incorporated them in their samples with a resulting higher bid price. It may also have had the effect of causing some potential bidders not to submit bids, hence lessening competition. Therefore, based on the above, we believe the contract was improperly awarded to a bidder who was nonresponsive to the requirements contained in the IFB."

Further we have held that an IFB which fails to list all the characteristics deemed essential or lists characteristics which are not essential is defective. 49 Com. Gen. 347 (1969). Since the IFB listed wet-type, removable cylinder liners and a water-cooled exhaust manifold as salient characteristics which the procuring activity, in light of award to Dobbs, apparently determined were not essential to its needs, the IFB should have been canceled as defective and a readvertisement made of the Government's actual requirements. See Business Equipment Center, Ltd., supra. The award to Dobbs clearly demonstrates that, had the IFB contained only those material characteristics affecting performance which were essential to the needs of the Government, the Dobbs bid would have been responsive.

Justice has stated that it was influenced by Dobbs Detroit Diesel, Inc., B-182992, May 29, 1975, 75-1 CPD 326, in making the award to Dobbs. That decision involved a prior attempt by Justice to purchase the generating plant being procured here. The IFB there required a four-cycle diesel engine. Since all bids were found to be nonresponsive, we concluded that no award could be made. We stated that before the procurement was resolicited, consideration should be given to revising the specifications to allow a two-cycle engine to be offered, since, all factors being equal,


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"state of the art" two-cycle engines could very well be equal to the four-cycle engine. This consideration was meant to be in the context of renewed competition and not in the context of accepting a nonresponsive bid offering a product demonstrating satisfactory performance characteristics. In this regard, we sustained the rejection of the low Dobbs bid there for failure to comply with the four-cycle requirement.

In view of the foregoing circumstances, we recommend that the contract with Dobbs be terminated for the convenience of the Government. As we have concluded that the IFB was defective, the procurement should be readvertised. Since it appears that the actual needs of the Government can be met by equipment with salient characteristics other than those used here, we suggest that all necessary steps be taken to assure that the readvertisement accurately reflects only the actual needs of the procuring activity to permit full and free competition by all bidders.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the House and Senate Committees on Government Operations and Appropriations concerning the action taken with respect to our recommendation.

Deputy


Comptroller General
of the United States