

DOCUMENT RESUME

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[Allegation of Improper Purchase of Hospital Room Furniture].
B-187552. July 21, 1977. 7 pp.

Decision re: Borg-Warner Health Products, Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).

Organization Concerned: Department of the Army: Walter Reed Army Medical Center; Joerns Furniture Co.

Authority: 41 C.F.R. 010-26.408-5. B-186057 (1976).

The protester contended that a purchase of hospital room furniture by the Army was invalid. The agency's order from a Federal Supply Schedule contractor was valid even though the contractor had listed its equipment under special item categories which inaccurately described the contractor's equipment. The selected contractor's listed prices were not higher than those of any other contractors whose items met the Government's needs. The agency's orders based on quoted prices which were lower than those in the Federal Supply Schedule catalog were not improper. (Author/SC)

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DECISION



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

FILE: B-187552

DATE: July 21, 1977

MATTER OF: Burg-Warner Health Products, Inc.

DIGEST:

1. Agency's order from Federal Supply Schedule contractor is valid even though contractor had listed its equipment under special item categories inaccurately describing contractor's equipment.
2. Contractor's listing of its equipment under special item categories inaccurately describing contractor's equipment does not render contractor's Federal Supply Schedule multiple award contract invalid. Intent of such listing is only to identify, as closely as practicable to industry practice, comparable items of the particular commodity in order to provide initial guidance to the user agency as to what contractors are available to supply which commodities. Furthermore, none of the categories under which equipment could be listed accurately described contractor's equipment thus forcing the contractor to choose, in effect, between two equally inaccurate categories.
3. The fact that one contractor chose to list its equipment under a special item category in its Federal Supply Schedule price list which inaccurately described contractor's equipment and which caused evaluating agency to assume incorrectly that contractor's equipment would not meet its minimum needs does not affect another contractor's FSS contract, or orders placed thereunder, where the other contractor listed its essentially identical equipment under an incorrect category which affectively allowed its equipment to be evaluated.
4. Federal Supply Schedule contractor's prices were evaluated as lower than those contained in the FSS contractor's catalog because of the contractor's attempted price reductions. Even assuming that the applicable prices were those listed in the contractor's catalog, agency's orders based on the lower prices are not improper, because contractor's listed prices have not been shown to be higher than those of any other contractors whose items met the Government's needs.

5. Agency's evaluation of FSS contractor's equipment need not take into account deductions in contractor's schedule prices for lower priced accessories which are not offered by the contractor.
6. Allegation that Federal Supply Schedule contractor's equipment does not meet specified minimum safety requirements is a matter of contract administration where contractor has taken no exception to such requirements.

Borg-Warner Health Products, Inc. (Borg-Warner) has protested the Army's purchase of hospital room furniture (electric and manual beds and overbed tables) from Joerns Furniture Company (Joerns) under Delivery Order DADA 15-76-P-R060. The delivery order was issued by Walter Reed Army Medical Center (WRAMC) under the General Services Administration's (GSA) Federal Supply Schedule (FSS) contract GS-OOS-01118. Borg-Warner contends that the purchase is invalid because: (1) Joerns listed itself incorrectly on the FSS from which WRAMC made its purchase; (2) Joerns improperly reduced its price in violation of the terms of its FSS contract; (3) Borg-Warner offered lower priced items responsive to WRAMC's minimum needs; and (4) Joern's electric bed does not meet the solicitation's electrical safety requirements.

Borg-Warner's first ground of protest is that Joerns listed its manual and electric beds under the wrong category on the FSS and thereby misrepresented its equipment. Specifically, the schedule calls for electric and manual beds, respectively, with head and footboards removable without tools, whereas only the headboards of the Joern's beds listed under the applicable FSS are removable without tools.

We asked GSA to comment on Borg-Warner's allegation. GSA explained that when the schedule was established no specific category was designated for beds with headboards that were removable without tools but footboards that were not. This placed bidders manufacturing such items in the position of choosing between two categories neither of which accurately described their products. Moreover, it is GSA's position that for medical reasons the supplier which chooses to list its beds with headboards removable without tools and fixed footboards under a category describing beds with both headboards and footboards removable without tools, chooses the category where such beds best fit. GSA states that, more importantly, the intent of the item description in a multiple award schedule is to identify, as closely as practicable, comparable items of the particular commodity in order to provide initial guidance to the user agency as to what contractors are available to supply which commodities. See FPR § 101-26.408.1.

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Also, GSA notes that to the extent that Joerns manual beds appeared in the wrong category, that is an error solely with regard to an accessory (footboards removable without tools) and does not go to the subject matter or affect the validity of the FSS contract or the WRAMC purchase order. We see no reason to disagree with GSA's views in the matter.

In this regard, we note Borg-Warner's contention that at least one of Joerns' competitors, namely Foster Hard, listed its equipment under the FSS to its detriment. The consequence of Foster Hard's representation that its equipment could only be classified as having nonremovable head and footboards, was its exclusion from consideration, even though its headboards were, in fact, removable without tools. The fact is that neither firm could list its equipment in categories accurately describing it. It is also reported that Foster Hard had no FSS contract at the time award was made, since Foster Hard's contract expired on July 31, 1976, whereas award to Joerns was made on September 30, 1976, under a subsequent schedule. Moreover, if there had been a clear understanding prior to July 31, 1976 between Foster Hard and the Army that Foster Hard offered a headboard removable without tools, the Army is of the view that Foster Hard's bed would have been unacceptable for the reason that, when raised to its maximum height, the bed was two inches too low to meet WRAMC's minimum needs.

The second ground of protest concerns what Borg-Warner characterizes as a "limited price reduction offer" made by Joerns. In that regard Borg-Warner is referring to two letters dated August 9, 1976 and August 30, 1976 addressed to GSA, FSS, National Furniture Center, which stated in pertinent part:

"August 9, 1976

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"Re: Contract # GS-005-01118

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"Relating to our letters of July 29, and July 26
I am submitting revised prices relating to pending projects requesting effectiveness for a period of 60 days from date."

(The August 30, 1976 letter merely added furniture groupings that had been omitted from the August 9 letter.) There followed prices on all of the items listed in Joerns' catalog submitted pursuant to its FSS contract effective August 1, 1976. Apparently, GSA accepted these prices on August 16 and September 9, 1976, respectively. The large majority of these so called "reductions" were really not reductions at all, but merely restated the prices of Joerns' then effective catalog. In the instant case only the prices of side rails and casters were involved in the attempted price reductions. According to Borg-Warner, this "limited price reduction" is the only legal interpretation that can be given Joerns' letters of August 9, and August 30, 1976. Moreover, Borg-Warner argues that, even though FSS contractors may offer price reductions pursuant to the "Price Reduction" clause (41 C.F.R. § 101-26.408-5 (1976)), it argues that the effect of allowing offerors to reduce their prices while a particular purchase is pending constitutes an auction which should not be allowed.

The "Price Reduction" clause in question states in pertinent part as follows:

"66. PRICE REDUCTIONS

(Applicable to each solicitation, contract, and resulting Federal Supply Schedule involving multiple awards.) (a) Reductions to commercial customers and Federal agencies.

"(1) If, after the date of the offer, the Contractor (i) changes any of the pricing documents or related discounts which were offered to and used by the Government to establish the prices in this contract or (ii) sells any supplies, equipment, or services covered by this contract at a price below that in any of the above referenced pricing documents so as to reduce any price within the applicable maximum order limitation to any customer, an equivalent price reduction shall apply to this contract for the duration of the contract period or until the price is further reduced, except for temporary price reductions. For purposes of this paragraph, any method by which the price is effectively reduced shall constitute a price reduction provided that temporary or promotional price reductions shall be made available to the Contracting Officer under the same terms and conditions as to other customers, except that in lieu of accepting bonus goods, the Contractor's cost of such goods shall be deducted from the contract price."

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In Microcom Corporation, B-186057, November 8, 1976, 76-2 CPD 385 we stated that the purpose of this clause is to insure that the Government receives the benefit of any general price reduction that may occur during the FSS contract period. Although it may be the case that in certain instances suppliers may engage in competitive bidding for a particular order, we believe that requiring those prices for the entire FSS contract period is a sufficient deterrent to prevent abuses. Moreover, we see the clause as a reasonable means to achieve the result envisioned by GSA in using the "Price Reduction" clause, which is to place the Government in a preferred customer status.

Regarding Borg-Warner's argument that Joerns' price reduction was limited to sixty days and, therefore, could not be accepted by GSA, we again must note that under the "Price Reduction" clause no offer by the seller or acceptance by the Government is contemplated. Price changes are effected unilaterally by the seller, and if they constitute a price reduction, then the Government is entitled to that reduction for the contract period. In the instant case the sixty-day period appears to be a "Government only", temporary price reduction which GSA asserts is at variance with the "Price Reduction" clause. That portion of the clause states in pertinent part that:

"For the purpose of this paragraph, any method by which the price is effectively reduced shall constitute a price reduction: Provided, that temporary or promotional price reductions shall be made available to the Contracting Officer under the same terms and conditions as to other customers. * * *"

GSA interprets the proviso to mean that temporary or promotional price reductions are those which are publicized to the contractor's customers and of which the Government is only an incidental beneficiary. Thus GSA believes that the apparent "Government only" temporary price reduction would have no effect under the "Price Reduction" clause. Borg-Warner argues, however, that GSA had no authority to disregard such time limitations and extend Joerns' "limited" price reduction offer over the length of the contract. GSA argues that it does not matter whether Joerns' "limited" price reduction had any legal effect, because there has now been a sale, and, regardless of any attempted price reductions, GSA must now hold Joerns to all sale prices that were lower than Joerns' FSS catalog prices.

Be that as it may, Borg-Warner has not shown how it or any other supplier was prejudiced by Joerns having its equipment evaluated at prices lower than its listed prices. The discounted

price at which Joerns' equipment is listed based on its 1977 catalog prices amounted to \$475,246, whereas it was evaluated at \$472,648. Either price is lower than any proper evaluation of Borg-Warner's prices (as discussed below). Accordingly, we do not find that Joerns' attempted price reduction and the consequences thereof are, of themselves, sufficient bases for upsetting the purchase from Joerns.

Next, Borg-Warner contends that it offered the lowest priced beds meeting the Government's minimum needs. This contention is supported by a number of arguments advanced by Borg-Warner both with respect to the price of its equipment as compared to Joerns' and what Borg-Warner argues is the Army's improper rejection of Borg-Warner's most price competitive electric beds.

Regarding Borg-Warner's argument that it offered the lowest priced beds, Borg-Warner concedes that, without adjustment to its or Joerns' prices, Joerns apparently offered lower priced beds to meet the Government's stated requirements. Borg-Warner argues, however, that certain downward adjustments to its prices and upward adjustments to Joerns' prices are necessary. First, in order properly to compare Joerns' bed with Borg-Warner's higher priced bed, Joerns' prices need to be increased to reflect what Borg-Warner views as WRAMC's requirement for the more expensive plastic laminate in lieu of Joerns' vinyl laminate finishes on the head and footboards. Moreover, Borg-Warner argues that the price of Joerns' beds should be evaluated in such a way as to negate the \$24,000 advantage accruing to Joerns' evaluated price when the Army decided that full length safety sides would suffice instead of twice as many half-length safety sides. Assuming no other adjustments, Borg-Warner's price for its higher priced bed with "split" or half-length sides would have been evaluated as approximately \$523,831 whereas Joerns' price using half-length sides would have been evaluated as approximately \$520,601. Because Joerns' price for safety sides on the whole is significantly more than is Borg-Warner's, reducing the number of safety sides by half lowered Joerns' price by \$48,043 but Borg-Warner's only by \$24,011, hence Joerns' "\$24,000 advantage." In our view it is axiomatic that the Government's minimum needs are the sole criterion under which Federal Supply Schedule prices must be evaluated. Microcom, supra. Accordingly, we agree with the contracting officer that, as between Joerns' model 9660 (electric) and 9300 (manual) beds and Borg-Warner's Model 4 (electric) and Model 13 (manual) beds, Joerns' beds were the lower priced.


Borg-Warner's second argument in this regard assumes no adjustments to Joerns' price of \$472,648, but is based on the concept that certain deductions in price must be applied to

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Borg-Warner's Model 7 (electric) and its Model 13 (manual) beds, which, when applied, result not only in a more favorable comparison to Joerns' beds but in Borg-Warner's price being lower. These deductions, premised on Borg-Warner's supplying vinyl laminate as opposed to plastic laminate head and footboard panels in its Model 7 and Model 13 beds, would allow WRAMC to deduct, inter alia, \$11,475.04 (\$14,343.86 less 20% discount) from Borg-Warner's evaluated price of \$476,879.88 (which is a price that assumes, for the sake of argument, that all other deductions which were advanced by Borg-Warner are proper for consideration). Evaluated in this way, Borg-Warner's price would be \$7,000 lower than Joerns'. As the Army correctly points out, however, Borg-Warner does not offer vinyl laminate head and footboards in its FSS contract and, therefore, it cannot be the basis for evaluating the price of Borg-Warner's beds. Accordingly we need not decide whether the Army properly rejected Borg-Warner's Model 7 bed as unacceptable.

Finally, Borg-Warner has alleged that Joerns' electric bed does not meet certain minimum electrical safety standards as specified in the schedule contract. Joerns, in our view, has taken no exception to any such requirements, and, therefore its FSS contract is valid on its face. Whether, in fact, the beds meet the requirements is a matter of contract administration and will not be considered here.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States