

## DECISION



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

FILE: B-186429

DATE: November 10, 1976

MATTER OF: Tri-Com, Inc.

## DIGEST:

1. Mere presence of "Brand Name or Equal" clause in solicitation does not operate, under applicable procurement regulation, to make clause applicable to "Brand Name or Equal" component of main item being purchased. Nor, under regulation, does "Bidding on: Manufacturer's Name" provision of solicitation operate to apply "Brand Name or Equal" clause to component.
2. Solicitation statement that descriptive literature would be considered insofar as "Brand Name or Equal" component was concerned fails to make "Brand Name or Equal" clause applicable to component since statement merely advised bidders that literature, if furnished, would be considered as contrasted with mandatory requirement in clause that bidders offering "equal products" furnish literature about "equal" products. Consequently, bidders were not required to identify component being offered.
3. Notwithstanding inapplicability of "Brand Name or Equal" clause to component, wording of solicitation compels conclusion that bidders were bound to furnish brand name component or suitable "equal" product by submitting signed, priced bid. In view of conclusion, and further conclusion that "Bidding on: Manufacturer's Name" provision of solicitation was surplusage, insertions made in provisions by certain bidders are of no effect and cannot be considered to be evidence of prejudicial ambiguity.
4. Since bidders' insertions in "Bidding on: Manufacturer's Name" provisions of submitted bids were of no effect, all bidders were free to designate choice of either brand name component or equal product after bid opening as low bidder did. Therefore, even if provision can be said to be ambiguous, no bidder can be said to have been prejudiced thereby because each had same opportunity.
5. Generally, mere use of inadequate specifications is not, absent showing of prejudice, compelling reason, under applicable precedent, to cancel solicitation and readvertise if award under solicitation would serve procuring agency's actual needs. Analysis shows that award under solicitation which failed to convey agency's intent regarding "Brand Name or Equal" component would not prejudice other bidders and would serve agency's actual needs.

Tri-Com, Inc., has protested the decision of the National Aeronautics and Space Administration (NASA) to cancel invitation for bids (IFB) No. 3-788531 because of an "ambiguity of the type which caused prejudice to the bidders."

The ambiguity is said by NASA to arise from the IFB's listing of a "Brand Name or Equal" component of the item (signal conditioners) to be purchased. The component--Amphenol Borg Series 3000 Microdial (indicating dial or equal--was listed as part of the purchase description on page 9 of the IFB as follows:

"ITEM NO.	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
"1.	(1c) Signal Conditioner, resistance strain gage type; shall be in accordance with Specification No. U69G dated November 11, 1975.	1000	ea	* * *	
"2.	Operation Manual for Item No. 1 above; shall be in accordance with Paragraph F.1. of Specification No. U69G dated November 11, 1975, attached hereto and made a part hereof.	50	ea	(Price, if any, to be included in the price of Item No. 1)	

The indicating dials, called for in Paragraph B.5. of Specification U-69G shall be Amphenol Borg Series 3000 Microdial, or equal, consisting of the salient characteristics set forth therein:

**BIDDING ON:**

MANUFACTURER'S NAME \_\_\_\_\_ BRAND \_\_\_\_\_ MODEL NO. \_\_\_\_\_

**"NOTE:** THE SPECIFICATIONS WHICH FORM A PART OF THIS INVITATION FOR BIDS REPRESENT THE MINIMUM NEEDS OF THE GOVERNMENT. WHERE A BIDDER INDICATES THAT HE WILL PROVIDE AN ITEM IDENTIFIED BY MODEL NUMBER, AND DOES NOT EXPLICITLY TAKE EXCEPTION TO THE GOVERNMENT SPECIFICATIONS, IT WILL BE CONCLUSIVELY PRESUMED THAT THIS ITEM MEETS THE GOVERNMENT SPECIFICATIONS IN ALL RESPECTS OR WILL BE MODIFIED BY THE BIDDER TO MEET THEM IN ALL RESPECTS. ANY DESCRIPTIVE LITERATURE SUBMITTED WILL BE DISREGARDED.

"The preceding paragraph does not apply to Paragraph B.5 of the specification."

The blank lines provided in the "Bidding on: Manufacturer's Name" provision of the page were intended by NASA to provide a space for bidders' insertions of "Brand Name or Equal" components. As to the bidders who might list "equal" components, NASA says it further intended to require those bidders to submit descriptive literature regarding the conformity of the equal components to the list of salient characteristics of the brand name component which were specified elsewhere in the IFB.

NASA argues that it accomplished its intent to require bidders to submit descriptive literature regarding "equal" components by: (1) Advising bidders that the NOTE (concerning the disregarding of descriptive literature) following the "Bidding on: Manufacturer's Name" provision was not to apply to the "Brand Name or Equal" component specification; and (2) Incorporating NASA's standard "Brand Name or Equal" clause which requires bidders offering "equal" products to submit descriptive literature with their bids about their products.

Notwithstanding the measures taken, NASA informs us that Tri-Com, the low bidder under the subject IFB, and 3 of the other 12 bidders "placed the name of the manufacturer of the signal conditioners, and not the dial, in the space provided \* \* \*." Two of the bidders listed the referenced brand name component part in the blank spaces provided in their bids; the remaining six bidders left the spaces blank.

Although NASA acknowledges that Tri-Com listed only the name of the manufacturer of the signal conditioner in the blank spaces provided, it insists that the listing would only obligate Tri-Com to supply a Tri-Com model No. 19 indicator dial. Because of this view, NASA also insists that the company's obligation gave rise to a corresponding obligation under the IFB's "Brand Name or Equal" clause to furnish descriptive literature about the Tri-Com model with its bid. Since the bid did not contain this literature, NASA argues that Tri-Com's bid must be considered nonresponsive.

Nevertheless, NASA believes that because the "Bidding On: Manufacturer's Name" provision was read in different ways it must be considered ambiguous and that fairness requires cancellation of the IFB and readvertisement of the requirement.

Counsel for Tri-Com rejects NASA's argument. He points out that NASA Procurement Regulation (NASA-PR) § 1.1206-3(c) (1975) requires that bidders be specifically informed whether the "Brand Name or Equal"

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clause applies to components for which equal products are acceptable. If the clause is to apply, bidders are to be informed of its applicability by means of an express statement (found in NASA-PR § 1.1206-3(c)(2)) substantially to the following effect:

"The clause entitled 'Brand Name or Equal' applies to the following component parts."

And counsel for Tri-Com argues that the measures NASA took to advise bidders of the intended applicability of the "Brand Name or Equal" clause to the indicating dial component were not the substantial equivalent of the express statement referenced in the quoted regulation.

Since, in Tri-Com's view, NASA failed to properly advise bidders of the applicability of the clause, counsel urges that there was no requirement for bidders to identify the "Brand Name or Equal" component in submitted bids and that the listing of the Tri-Com model No. 19 should be read only as showing the manufacturer of the signal conditioner. Consequently, Tri-Com contends that it should receive award under the IFB and that cancellation of the IPR is not called for.

We agree with Tri-Com's argument that, notwithstanding NASA's stated intent to apply the "Brand Name or Equal" clause to the indicating dial, the IFB did not contain a sufficiently definite statement along the lines contemplated by the quoted regulation to make that intent clear. The mere presence of the "Brand Name or Equal" clause in the IFB does not operate, under NASA-PR § 1.1206-3(c)(2), to make the clause applicable to the component; nor, under the cited regulation, does the "Bidding on: Manufacturer's Name" provision of the IFB operate, in itself, to apply the clause to the component. The IFB statement that descriptive literature would be considered insofar as the "Brand Name or Equal" component was concerned also fails, in our view, to make the clause applicable. The statement merely advised bidders that descriptive literature, if furnished, regarding the component would be considered (by contrast the "Brand Name or Equal" clause requires bidders to furnish descriptive literature about their "equal" products) but said nothing about the purpose that

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would be served in furnishing the literature--a purpose which is clearly stated in the clause. Because of the above analysis, it is clear that neither Tri-Com nor other bidders were required to identify the component being used or to furnish descriptive literature.

Notwithstanding the fact that the "Brand Name or Equal" clause was not made applicable to the component, the wording of the IFB compels a conclusion that all bidders were bound to furnish the brand name component or a suitable equal merely by submitting a signed, priced bid. Consider the following IFB provisions: (1) The above-quoted provision of page 9 of the IFB provides that the indicating dials "shall be" the brand name component or equal; and (2) the specifications for the indicating dials (page 2 of the general specifications for the signal conditioner) also provide that the indicating dials "shall be" the brand name component or an "equal" substitute complying with the salient characteristics of the brand name component.

Since the "Brand Name or Equal" clause was not applicable to the component and bidders were otherwise obligated under the mandatory wording of the IFB to provide the brand name component or a conforming equal, the "Bidding on: Manufacturer's Name" provision must be considered to be mere surplusage--otherwise the provision would have to be regarded, in itself, as making the "Brand Name or Equal" clause applicable to the component. Consequently, the insertions contained in the surplus provisions in 6 of the 12 bids must be considered to be of no effect and cannot be considered to be evidence of prejudicial ambiguity. All bidders were, therefore, free to designate their choice of either the brand name component or an "equal" product after bid opening, as Tri-Com did; no bidder can be said to be prejudiced thereby because each had the same opportunity to do so after bid opening.

There remains the question whether NASA's failure to convey its intent to make the "Brand Name or Equal" clause applicable to the component is sufficient grounds to require cancellation and readvertisement. Generally, the mere use of inadequate or otherwise deficient specifications is not, absent a showing of prejudice, a compelling reason, under applicable precedent, to cancel an IFB and readvertise. GAF Corporation, 53 Comp. Gen. 586, 592 (1974), 74-1 CPD 68. As we said in the cited case:

"\* \* \* The rejection of all bids after they have been opened tends to discourage competition because it results in making all bids public without

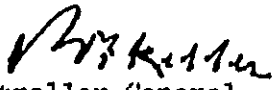
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award, which is contrary to the interests of the low bidder, and because rejection of all bids means that bidders have expended manpower and money in preparation of their bids without the possibility of acceptance. 52 Comp. Gen. 285 (1972). Moreover, as a general proposition, it is our view that cancellation after bids are opened is inappropriate when an award under a solicitation would serve the actual needs of the Government. 49 Comp. Gen. 211 (1969); 48 id. 731 (1969)."

Having concluded that no bidder was prejudiced by the provisions in question or by Tri-Com's post-bid-opening statement that it intends to furnish the specified brand name component rather than an "equal" component, the remaining question is whether an award under the IFB to Tri-Com would serve NASA's actual needs.

Since Tri-Com has elected to furnish the brand name component, there is no ambiguity about the component as to which descriptive literature might otherwise arguably be helpful in assessing whether an award to Tri-Com would meet NASA's actual needs. Therefore, it is apparent that an award, if otherwise proper, to Tri-Com would serve NASA's actual needs.

Protest sustained.

  
Acting Comptroller General  
of the United States