

DOCUMENT RESUME

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[Rejection of Bid as Nonresponsive]. B-188633. August 31, 1977.
8 pp.

Decision re: Environmental Conditioners, 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 1.
Budget Function: General Government: Other General Government
(806).

Organization Concerned: Department of the Interior.

Authority: B-186476 (1976). B-184341 (1976). B-179767 (1974).
B-181537 (1974). B-188047 (1977). B-170235 (1970). B-187438
(1976). B-179914 (1974). 52 Comp. Gen. 647. 52 Comp. Gen.
649.

The protester objected to the rejection of its bid as nonresponsive. The bid was nonresponsive since the bidder failed to demonstrate that the units bid satisfied the 2-year experience requirement specified in the solicitation. A nonresponsive bid cannot be considered even if the units bid satisfy the intent of the specifications or the bid offers the Government monetary savings. The alleged innovative feature of the units cannot be considered in determining the low bidder unless the characteristics of such features are set forth in the invitation as evaluation criteria so that bidders can compete on an equal footing. (Author/SC)

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DECISION



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

FILE: B-188633

DATE: August 31, 1977

MATTER OF: Environmental Conditioners, Inc.

DIGEST:

1. While bidder may submit descriptive literature subsequent to bid opening if such material was available prior to bid opening containing details of model bid as "equal" to brand name product to substantiate that model bid meets Government's requirements, where, as here, IFB provides that units with less than 2 years of operation will be rejected as prototypes and requires that bidders supply location and dates of installation of units similar or equal to those bid handling similar or equal material, and such information is not contained in bid or in descriptive literature available prior to bid opening, bid is nonresponsive since bidder failed to demonstrate that units bid satisfied 2-year experience requirement.
2. Nonresponsive bid cannot be considered even if units bid satisfy intent of specifications or bid offers Government monetary savings.
3. Alleged innovative feature of units cannot be considered in determining low bidder unless characteristics of such features are set forth in IFB as evaluation criteria so that bidders can compete on equal footing.

The Department of the Interior (Interior) issued invitation for bids (IFB) CX-1490-INV-22 for the procurement of two package tertiary treatment units for the Mesa Verde National Park in Colorado. Part 1-2B. of the IFB provides as follows:

"Manufacturer's Literature: Submit 4 copies of pump curves and specifications on all mechanical and electrical components. Units with less than two years of operation will be considered prototype, and therefore will not be considered. Location and date of installation of similar or equal units handling similar or

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equal material must be submitted. This information shall be evaluated to determine if the units submitted will meet the requirements of these specifications. After installation, the successful Bidder shall supply data pertaining to maintenance and operations of these units in the form of an operation and maintenance manual. Recommended spare parts to be included in maintenance manual."

The IFB also provides that the tertiary units shall be model SWB 25 and SWB 50, as manufactured by Neptune Microfloc, Inc. (Microfloc), or an approved equal. In addition, the IFB included a "brand name or equal" clause, which provides in part that:

"(a) If items called for by this invitation for bids have been identified in the schedule by a 'brand name or equal' description, such identification is intended to be descriptive, but not restrictive, and is to indicate the quality and characteristics of products that will be satisfactory. Bids offering 'equal' products (including products of the brand name manufacturer other than the one described by brand name) 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.

* * * * *

"(c) (1) If the bidder proposes to furnish an 'equal' product, the brand name, if any, of the product to be furnished shall be inserted in the space provided in the invitation for bids, or such product shall be otherwise clearly identified in the bid. The evaluation of bids and the determination as to equality of the product offered shall be the responsibility of the Government and will be based on information furnished by the bidder or identified in his bid as well as other information reasonably available to the purchasing activity. CAUTION TO BIDDERS. The purchasing activity is not

responsible for locating or securing any information which is not identified in the bid and reasonably available to the purchasing activity. Accordingly, to insure that sufficient information is available, the bidder must furnish as a part of his bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the salient characteristics requirement of the invitation for bids, and (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include specific references to information previously furnished or to information otherwise available to the purchasing activity."

Bids were opened on March 8, 1977, with the following results:

Environmental Conditioners, Inc.	\$37,480
Microfloc	41,770

Environmental Conditioners, Inc. (Environmental Conditioners), indicated in its bid that it complied with all conditions of the IFB and that its "equal" units complied with the salient characteristics of the brand name units, which were set forth in the IFB. Environmental Conditioners also included the following explanatory note in its bid.

"*The equipment items specified are those provided by Neptune Microfloc. The equipment items offered are standard products which are designed and manufactured by Environmental Conditioners, Inc. These items are succinctly described in the attached three drawings and the components of the systems are delineated in the attachment. Design criteria, detail drawings and all required submittal materials will be forwarded for approval within four (4) days after receipt of contract."

Environmental Conditioners' bid, along with its drawings for its model "F" units which it bid, was forwarded to the project supervisor for review. After examining the bid and drawings, the project supervisor concluded that the model "F" units did not meet specifications. Environmental Conditioners' bid was subsequently

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rejected as being nonresponsive. To be more specific, Interior states in substance that:

1. Environmental Conditioners submitted no data concerning the location and dates of installation of units similar or equal to those bid. To the best of Interior's knowledge, Environmental Conditioners did not have similar or equal units in operation.

2. It could not be determined from Environmental Conditioners' bid and the accompanying drawings whether the units bid met all of the salient characteristics set out in Parts 2-3, 2-4, 2-6, and 2-10 of the IFB, which respectively deal with the flocculator section, settling chamber, filter section, and unit operation.

3. However, it could be determined that the units bid by Environmental Conditioners did not satisfy certain salient characteristics of Part 2-4, entitled Settling Chamber.

Interior also contends that Environmental Conditioners knew prior to bid opening that the salient characteristics for the units were based on Microfloc units. Consequently, any question concerning the propriety of the specifications should have been raised prior to bid opening.

Environmental Conditioners protests in substance as follows:

1. As the low bidder, it offered units which not only satisfied the intent of the salient characteristics, but which would also function as well as or better than the brand name units.

2. Interior has previously accepted Environmental Conditioners' units as equal to the brand name units; consequently, there is no reason for rejecting Environmental Conditioners' bid.

3. The units offered by Environmental Conditioners have a new feature, which the brand name units may not have, which

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complies with regulations recently issued by the State of Colorado, where the units are to be used.

4. When Interior evaluated the bids, it did not request data showing that units similar or equal to those bid by Environmental Conditioners have been in operation for 2 years, as required by Part 1-2. of the IFB (quoted above).

5. Prior to bid opening, Environmental Conditioners had prepared a so-called user's list, which was available to the public, giving the location and dates of installation of its units.

6. The drawings submitted with its bid generally show compliance with the salient characteristics.

7. That while its model "F" units did not meet the salient characteristics of Part 2-4 of the IFB, which were in error, neither did the brand name units.

In addition, Environmental Conditioners suggests that Interior follow basic procurement rules such as those set forth in clause 9 of standard form 23-A, entitled GENERAL PROVISIONS (Construction Contracts), as well as in many other similar documents.

Standard form 23-A is inapposite here since it deals with construction contracts. No provision similar to clause 9 of standard form 23-A appears in standard form 32, entitled GENERAL PROVISIONS (Supply Contracts), which is applicable here.

Finally, Environmental Conditioners requests an explanation of clause 21 of standard form 32 and clause 29 of standard form 23-A. These clauses, which are identical, provide as follows:

"UTILIZATION OF SMALL BUSINESS CONCERNS

"(a) It is the policy of the Government as declared by the Congress that a fair proportion

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of the purchases and contracts for supplies and services for the Government be placed with small business concerns.

"(b) The Contractor agrees to accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this contract."

The obvious import of these clauses is that it is the intent of the Congress that the Government let a fair proportion of contracts to small business concerns, and Government prime contractors are obligated to subcontract with small business concerns to the maximum extent consistent with the efficient performance of the contract.

The responsiveness of an "equal" bid, such as Environmental Conditioners', submitted in response to a brand name or equal procurement is dependent on the completeness and sufficiency of the descriptive information submitted with the bid, previously submitted information, or information otherwise reasonably available to the purchasing activity. Ocean Applied Research Corporation, B-186476, November 9, 1976, 73-2 CPD 393. Generally, a mere promise to conform to the salient characteristics of the solicitation does not satisfy the descriptive data requirement of the "brand name or equal" clause. Omni-Spectra, Inc., B-184341, April 14, 1976, 76-1 CPD 251. Consequently, an ambiguous bid must be rejected as non-responsive if either the bid or other data available to the Government prior to bid opening does not show compliance with the Government's stated requirements. SEG Electronics Corporation and Boonton Electronics Corporation, B-179767, May 16, 1974, 74-1 CPD 258. A bid must also be rejected where the offered product fails to conform to the salient characteristics of the brand name product. General Hydraulics Corporation, B-181537, August 30, 1974, 74-2 CPD 133.

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While we have held that a bidder may submit descriptive data to the Government after bid opening if such data were in existence prior to bid opening and it contains details of the model indicated in the bid, if no model numbers are provided in the bid, the bidder may not be permitted to provide both the model number and descriptive data after bid opening, for that would give the bidder the election to make a nonresponsive bid responsive. Furthermore, the procuring activity has no obligation to go to the bidder after bid opening or to make any other unreasonable effort to obtain descriptive data. Pure Air Filter International Thermal Control, Inc., B-188047, May 13, 1977, 77-1 CPD 342.

Part 1-2B. of the IFB, quoted above, provides in effect that units which have been operational for less than 2 years would be considered prototypes and, therefore, would be rejected. Part 1-2B. also required that bidders provide with their bids the location and dates of installation of units similar or equal to those bid handling similar or equal material. We have held that where, as here, experience requirements deal with the item to be procured, the requirements concern bid responsiveness. Experience requirements pertaining to bidders, however, is a matter of responsibility. 52 Comp. Gen. 647, 649 (1973).

While Environmental Conditioners did not indicate in its bid that its model "F" units satisfied the 2-year experience requirement, Environmental Conditioners alleged after the filing of its protest that a user's list was available prior to bid opening giving the location and dates of installation of its units. However, there is no indication that Interior was made aware of the existence of such list. Therefore, Interior was under no obligation to request that Environmental Conditioners provide such information. Moreover, it is not necessary for Interior to consider such information at this late date. Furthermore, our review of the user's list made available to us discloses that while it provides the location and dates of installation of Environmental Conditioners' units, it cannot be determined from the face of the user's list whether units similar or equal to those bid by Environmental Conditioners had been in operation for 2 years. Since neither Environmental Conditioners' bid nor information available prior to bid opening clearly demonstrates that the 2-year experience requirement had been met, we must conclude that Environmental Conditioners' bid is nonresponsive. 52 Comp. Gen. supra.

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Environmental Conditioners may not properly be permitted to provide additional information regarding the experience of its equipment for that would give it the election to make a nonresponsive bid responsive. Pure Air Filter International Thermal Control, Inc., supra. Although Environmental Conditioners alleges that Interior has previously accepted its units as equal to the brand name units, there is no evidence of record which indicates that the solicitation under which the units were procured contained any experience requirement. Also, no evidence has been presented which shows that either the salient characteristics of Part 2-4 of the IFB were in error or that the brand name units failed to meet these requirements.

With regard to Environmental Conditioners' allegation that, as low bidder, it offered units which would function as well as or better than the brand name units, we have held that a nonresponsive bid cannot be considered for award even though the items bid satisfied the intent of the specifications, B-170235, November 18, 1970, or even if, as here, the nonresponsive bid offered the Government monetary savings, Ed-Mor Electric Co., Inc., B-187438, November 17, 1976, 76-2 CPD 431, because acceptance of such bids would be contrary to the integrity of the competitive bidding system. Moreover, the alleged innovative feature offered by Environmental Conditioners could not have even been taken into consideration in determining the low bidder unless the characteristics of the feature had been set forth in the IFB as evaluation criteria so that bidders could compete on an equal footing. AMF Inc., B-179914, March 26, 1974, 74-1 CPD 144.

Accordingly, the protest is denied.

R. A. Kinn
Deputy Comptroller General
of the United States