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DECISION



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

FILE: B-201970

DATE: October 21, 1981

MATTER OF: The Prime-Mover Co.

DIGEST:

Rejection of low bid offering equipment which would meet agency's actual needs and award of contract to a higher bidder under specifications which agency knew or should have known overstated its minimum needs is improper.

The Prime-Mover Co. (PM) protests the award of a contract to Potomac Industrial Trucks under invitation for bids F41612-81-BA003 issued by Sheppard Air Force Base, Texas for two order picking vehicles (fork lift trucks). PM alleges that its low bid was improperly rejected as its product was equal to the brand name product specified in the invitation. Although it appears that PM's bid could not be accepted under the salient characteristics as listed in the solicitation, the protest is sustained because those characteristics did not reflect the agency's actual needs.

The solicitation called for two vehicles on a "brand name or equal" basis and listed a number of salient features deemed essential to the agency's minimum needs including minimum elevating and lowering speeds and a requirement that "power from the motor shall be transmitted through double reduction of spur gears to the drive wheel axle." PM offered its own model as an "equal" product, but its bid was rejected because the vehicle it proposed to furnish was determined not to meet the speed requirements and to have helical rather than spur gear drive.

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PM argues that the literature submitted with its bid clearly indicated that its vehicle met the specified minimum lowering and elevating speeds and that the agency must have been confused because PM offers a two-speed variable lifting and lowering operation. Further, PM states that its helical gear drive was not only equal to the specified spur gear drive but offered superior performance and is used in more expensive heavy duty vehicles. In this regard, PM notes that in five recent procurements using the identical list of salient characteristics the Air Force accepted PM vehicles. Of these five procurements, three, including one by Sheppard AFB, were conducted before this award while two were after this award.

The Air Force states that the speed requirements in the list of salient characteristics were ambiguous and that PM's vehicle was acceptable in that regard. The agency further states that it "has since concluded that a helical gear assembly such as that provided on the equipment proposed by Prime-Mover is suitable for the intended use." It maintains, however, that PM's bid was properly rejected because PM's proposed vehicle did not meet the solicitation requirement for a spur gear assembly.

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, such features must be presumed to have been regarded as material and essential to the needs of the Government. Cummins Mid-America, Inc., B-185664, May 26, 1976, 76-1 CPD 343. A solicitation which lists characteristics which are not essential, however, is defective. 49 Comp. Gen. 347 (1969).

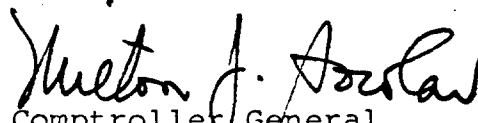
Although the Air Force states that it has "since" determined a helical gear is satisfactory, it has not attempted to rebut the protester's information which indicates various Air Force activities, including Sheppard Air Force Base, previously had found PM's equipment with a helical gear to be acceptable under the purchase description used in this

procurement. Thus, it appears from the record that the Air Force knew or should have known that the purchase description used overstated its minimum needs.

We need not decide at this point whether award should have been made to PM under these circumstances. Usually, when specifications overstate an agency's needs, cancellation of the solicitation is the appropriate course of action. In certain limited situations, however, an award properly may be made under defective specifications when the Government's actual needs would be satisfied and no bidder would be prejudiced by an award. See GAF Corporation; Minnesota Mining and Manufacturing Company, 53 Comp. Gen. 586 (1974), 74-1 CPD 68, where we recommended that award be made to a bidder whose product did not meet a salient characteristic which was not essential to the agency's needs and where it appeared that no products other than those offered in response to the solicitation could be expected to be offered under a resolicitation with revised specifications. In this case, the Air Force neither canceled the solicitation nor awarded a contract to PM; it instead rejected PM's product, which it concedes would have met its needs, and awarded a contract at a higher price to another bidder. This action clearly was improper, and for that reason we sustain the protest.

Since the contract has been fully performed, we are unable to recommend any corrective action. We are, however, bringing this matter to the attention of the Secretary of the Air Force.

The protest is sustained.

for 
Comptroller General
of the United States