

DECISION

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

FILE: B-214288

DATE: July 16, 1984

MATTER OF: Niagara Machine & Tool Works

DIGEST:

1. When unsolicited descriptive literature submitted with a bid refers to same model number as equipment bid and reveals that equipment does not meet material requirements included in a solicitation, contracting agency is not free to accept the bid. Even if bidder otherwise takes no exception to the specifications, the descriptive literature qualifies the bid and thus renders it nonresponsive.
2. Waiver of an advertised specification is improper if the deviation from it goes to the substance of a bid or works an injustice to other bidders. Substantial, i.e. material, deviation is one that affects the price, quality, or quantity of the goods or services offered.
3. Importance of maintaining the integrity of the competitive bidding system outweighs the advantage of any monetary saving that would result if material deviation from specifications is waived or ignored. When agency discovers that specifications overstate its needs, proper course of action is to cancel the invitation for bids and recompute on a less restrictive basis.

Niagara Machine & Tool Works protests the award of a contract under invitation for bids No. 16-PI-00110-4, issued by Federal Prison Industries, Inc. for a 45-ton

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press and two dies. The equipment will be used to produce grommets for U.S. Postal Service mail bags.¹ Niagara contends that the award was improper because the equipment offered by John R. Wald Company, Inc., the low bidder, did not meet specifications.

We sustain the protest.

The solicitation permitted bids for the press only, dies only, or press and dies. Wald offered both press and dies for a total of \$100,125; Niagara offered a press only for \$82,214; and two other firms offered dies only. Federal Prison Industries awarded the contract to Wald because the firm's bid was less than the combination of Niagara's press bid and the low die bid.

Niagara contends that Wald's equipment did not comply with a number of the specifications. Federal Prison Industries basically acknowledges this, stating that during its post-opening evaluation of bids, based on manufacturers' brochures and letters, it determined that the points on which Wald did not meet or exceed specifications were not critical and that Wald's press could perform the required operations.

The record shows that the press and the feeding equipment Wald offered do not comply in the following respects: the specifications require a press speed range of 73-220 strokes per minute and a motor of 7-1/2 horsepower, 1710 revolutions per minute; Wald's press has a single speed of 120 strokes per minute and a motor of 5 horsepower, 1200 revolutions per minute. Furthermore, the specifications for the stock straightener, through which the coil steel is fed into the press, require a "Mod-U-Loop" drive utilizing a 5 horsepower motor equipped with an electric eye to sense when material is to be moved and to prevent contact with the material. Wald's stock straightener includes a 1 horsepower drive and, instead of the required electric eye, a paddle control with mercury switch, which necessitates physical contact with the material.

According to Federal Prison Industries, the information indicating that the equipment offered by Wald did not meet the specifications was included in descriptive literature submitted with Wald's bid.

¹Grommets are produced from deep drawn coil steel fed from a centering reel through a straightener to the press.

Although the solicitation did not require descriptive literature for evaluation purposes, if Wald nevertheless submitted such literature, it could be regarded as qualifying the bid and thus would render the bid non-responsive. See Minnesota Mining and Manufacturing Co., B-212004, Nov. 17, 1983, 83-2 CPD ¶ 578. This is particularly the case where, as here, the model numbers of the press and dies described are the same as those bid. LogE/Spatial Data Systems, Inc., B-205016, May 17, 1982, 82-1 CPD ¶ 465.

Even, if Wald otherwise took no exception to the specifications, Federal Prison Industries was not free to ignore information indicating that the equipment offered did not meet material requirements included in the solicitation. Because of its impact on the competitive bidding system, affecting the right to compete on a common basis, a contracting agency may not waive an advertised specification if the deviation from it goes to the substance of a bid or works an injustice to other bidders. American Automotive Machinery, Inc., B-204385, Dec. 24, 1981, 81-2 CPD 494.

Our Office has defined a substantial, i.e. material, deviation as one that affects the price, quality, or quantity of the goods or services offered. Id. Here, it appears that price was affected, since Niagara estimates that if it had been permitted to provide equipment similar to that offered by Wald, it could have reduced its bid price by more than \$15,000. Federal Prison Industries has not attempted to rebut this assertion, which appears in Niagara's comments on the agency report, where prices were discussed. Award to Wald thus was improper.

We recognize that Federal Prison Industries has determined that the press Wald will furnish will meet its needs at the lowest bid price submitted in response to this invitation. Nevertheless, we often have stated that the importance of maintaining the integrity of the competitive bidding system outweighs the advantage of a monetary saving that would result if material deviations are waived or ignored. See Star-Line Enterprises, Inc., B-210732, Oct. 12, 1983, 83-2 CPD ¶ 450. If, upon discovering that the specifications in effect overstated its needs, Federal Prison Industries had canceled the invitation² and revised the specifications to recompute

² The procurement regulations cite the use of deficient specifications, or the finding that the government's needs can be satisfied by a less expensive item than that specified, as compelling reasons to cancel an invitation and readvertise. Federal Procurement Regulations, 41 C.F.R. § 1-2.404-1(b)(1) (4) (1983).

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the requirement on a less restrictive basis, the agency's needs may well have been satisfied at an even lower cost to the government.

We sustain the protest. Because the press has been delivered to Federal Prisons Industries, no remedial action is practicable. We are, however, recommending to the Attorney General by separate letter that this matter be brought to the attention of the procurement personnel involved to prevent a repetition.

for 
Comptroller General
of the United States