

DOCUMENT RESUME

02365 - [A1432421]

[Bid Responsiveness: Products "Equal" to Brand Name Products in Solicitation]. B-188047. May 13, 1977. 8 pp. + 1 enclosure (2 pp.).

Decision re: Pure Air Filter International; Thermal Control, Inc.; by Robert F. Keller, Acting Comptroller General. Decision forwarded to Clifford L. Alexander, Jr., Secretary of the Army.

Issue Area: Federal Procurement of Goods and Services (1900).  
Contact: Office of the General Counsel: Procurement Law II.  
Budget Function: National Defense: Department of Defense -  
Procurement & Contracts (058).  
Organization Concerned: Department of the Army: Army Air Defense  
Center, Fort Bliss, TX.  
Authority: A.S.P.R. 1-1206.2(b). 45 Comp. Gen. 312. 45 Comp.  
Gen. 316. 50 Comp. Gen. 137. B-188764 (1977).

Two bidders objected to the rejection of their bids on the basis of a lack of sufficient information to determine whether the offered products were equal to the brand name products in the solicitation. The bids were properly rejected. Procuring activity may not consider product information submitted by the bidder after bid opening, since to do so would permit the bidder to affect the responsiveness of the bid. Claims for "loss of profits" are not recoverable against the Government. The claim for bid preparation costs was denied since the bid was nonresponsive. (Author/SC)

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**DECISION**



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

FILE: B-188047

DATE: May 13, 1977

MATTER OF: Pure Air Filter International  
Thermal Control, Inc.

**DIGEST:**

1. Bids were properly rejected where information reasonably available to procuring activity was not sufficient to establish that protesters' offered products were "equal" to the brand name items specified in the IFB.
2. Where bid contains only the name of the manufacturer of a purportedly "equal" product, procuring activity may not consider model number and descriptive literature submitted by the bidder after bid opening, because to do so would permit bidder to affect the responsiveness of its bid.
3. Claim for "loss of profits" is not recoverable against Government. In addition, claim for bid preparation costs is denied where bid was properly rejected as nonresponsive.

In the summer of 1976, the Procurement Division, Army Air Defense Center, Fort Bliss, Texas, issued invitation for bids (IFB) No. DABT51-76-B-0236 for the supply of replacement filters to be used in the air handling systems located in Building 7777 of the William Beaumont Army Medical Center and Building 2496 at Fort Bliss. The Cambridge Corporation was identified as the brand name manufacturer of the fourteen types of filters being procured through this brand name or equal solicitation. All items were to be awarded to one bidder.

The solicitation contained the appropriate "brand name or equal" clause, which advised bidders in part that:

"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 requirements 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."

Four bids were received. Only the highest bidder, Control & Equipment Company, offered to supply the brand name products. The other three bidders, including the protesters, offered products which were purportedly equal to the brand name products. However, their bids were rejected because the contracting officer could not determine from the information available to her that the purportedly equal products offered did in fact meet the salient characteristics of the brand name products listed in the IFB. Award of the contract was then made to Control.

Thermal and Pure Air have protested the rejection of their bids on several alternative grounds: that information adequate to establish the equality of their products was in the contracting agency's possession at the time of bid opening; that the failure to supply any literature descriptive of their products should have been waived as a minor informality; or that the contracting officer should have asked them to provide descriptive literature after bid opening.

Several of the protesters' arguments are without merit and should be put to rest at the outset. Since the salient characteristics of a brand name product listed in the purchase description represent characteristics "which are essential to the needs of the Government" (Armed Services Procurement Regulation (ASPR) § 1-1206.2(b)), a bidder's failure to show that its allegedly equal product contains those characteristics cannot be waived as a minor informality. See 45 Comp. Gen. 312, 316 (1965). We have no objection to a bidder making available to the Government after bid opening descriptive data in existence prior to bid opening which contains details of the model indicated in the bid, because this does not permit the bidder to affect the responsiveness of its bid. See 50 Comp. Gen. 137 (1970). However, where no model numbers are provided in the bid (as in Thermal's case), we do not believe the bidder may be permitted to supply both the model number and descriptive data after bid opening, for that gives the bidder the election to make a nonresponsive bid responsive. Furthermore, we have stated that the agency has no obligation to go to the bidder after bid opening or to expend other unreasonable efforts to obtain descriptive data. See 50 Comp. Gen., supra. Therefore, we do not agree with Pure Air's contention that the contracting officer should have contacted it after bid opening to get descriptive data about model numbers contained in Pure Air's bid.

In our opinion, the issue presented by these protests is whether the bids were properly rejected in view of the information reasonably available to the procuring activity. In this regard, we note that the replacement of these air filters (at least so far as Building 7777 is concerned) appears to have been made annually at least since 1974. Therefore, the procuring activity relied primarily upon the procurement files for the two previous years, 1974 and 1975.

#### Thermal's Protest-

In its bid on the instant IFB, Thermal Control, Inc. simply indicated that it was bidding on products manufactured by Airguard Industries, Inc. of Louisville, Kentucky. No model numbers or descriptive literature were furnished with the bid.

Thermal was the successful bidder in the 1975 procurement in which eleven different models of filters were furnished for Building 7777. (Additional Items Nos. 12, 13, and 14 in the protested 1976 procurement appear to result from the addition of the requirements for Building 2496.) Thermal did supply descriptive literature with its 1975 bid.

The Schedules of the 1975 and 1976 IFBs as to the first eleven items are very similar. The brand name model numbers for Items 8, 9 and 10 differ slightly although the salient characteristics of those items remained the same. In view thereof, we assume the change in model numbers is not material. The widths of four roll-type filters, Items 4 through 7, are a few inches narrower than in the previous year's solicitation. Since these are replacement filters for existing air handling equipment, we are inclined to believe the difference in widths does not reflect a change in requirements, but the use of the actual rather than the nominal widths of the rolls. We also note that the quantities of Items 5, 6 and 8 vary slightly from 1975 to 1976. Other than these changes, the descriptions and quantities of Items 1 through 11 are identical for 1975 and 1976.

Since Thermal was awarded the previous year's contract for Items 1 through 11, for which it had supplied descriptive literature, we believe the equivalency of the Airguard filters for those items could be established by the procuring activity from information reasonably available to it. However, this is not the case for Items 12, 13 and 14, which are new requirements for 1976, and whose model numbers and specifications differ from the first eleven items. As for those items, the procuring activity knew from Thermal's bid only that it was proposing to supply "Airguard" filters. Thermal has not explained how the procuring activity could determine from this limited information exactly what Thermal was proposing to furnish. Thermal provided model numbers and descriptive data for these items after bid opening, but as we have explained above, this information could not be considered because to do so would permit Thermal to affect the responsiveness of its bid. We therefore believe Thermal's bid was properly rejected. In view of this conclusion, Thermal's claim for bid preparation costs is denied. The "loss of profits" also claimed by Thermal would not be recoverable against the Government in any event. See Robert Swartzel, B-188764, April 22, 1977, 77-1 CPD \_\_\_\_.

#### Pure Air's Protest

In the instant procurement, Pure Air offered the products of several manufacturers, including itself, as "equal" to the Cambridge brand name products. No descriptive literature was included in Pure Air's bid. As in the case of Thermal, we believe the equivalency of the products offered by Pure Air can only be partially established from information reasonably available to the procuring activity.

In its initial letter of protest, Pure Air advises that it is "licensed by the Cambridge Filter Corp. to manufacture the Cambridge Filter under their patent" and that Pure Air filters are therefore equal to the brand name product specified. As "proof" of this arrangement, Pure Air has provided the last page of an August 20, 1971, letter signed by the presidents of Cambridge and Pure Air. Not only is the first page of the letter missing, but the letter appears to set forth "interpretations" of a prior "Agreement" which also has not been provided to us. This fragmentary information provides no basis upon which to judge the nature of the agreement between Pure Air and Cambridge or how that agreement relates to the specific filters being procured. Moreover, this information was first presented as part of Pure Air's protest and its existence was not alluded to in Pure Air's bid. Pure Air states that it did not submit a copy of its license agreement with Cambridge because Fort Bliss had used Pure Air filters in the past. We have carefully examined Pure Air's 1974 and 1975 bids. Although the 1974 bid contains some technical literature about Pure Air's products, neither bid makes any reference to a license agreement with Cambridge.

The "Brand Name or Equal" clause contained in the present solicitation clearly advises bidders to furnish with their bids all information necessary to establish that the products offered met the salient characteristics requirements of the IFB. If Pure Air wished its license agreement with Cambridge to be considered for this purpose, it should have included a complete copy thereof with its bid.

Pure Air's 1975 bid on Items 1 through 11 was quite similar to its bid on the present IFB. In both years, it offered the same products for Items 1 through 7 and 11. In 1975 it offered Pure Air products for Items 8, 9, and 10, instead of Air Lab products which it offered in 1976. Bids were not solicited in 1975 for Items 12, 13 and 14. No descriptive literature was submitted with Pure Air's 1975 bid.

At most, Pure Air's 1975 bid might help establish the acceptability of Pure Air's offering for Items 1 through 7 and 11. However, Pure Air's bid was not evaluated for award that year, having been found nonresponsive because Pure Air offered roll filters of a different width than specified. Therefore, Pure Air's 1975 bid was not useful for determining the equivalency of the products it offered.

Going back another year, we find that in 1974, Pure Air received a partial award of five items made by the same manufacturers, having the same salient characteristics, and in the same quantities as Items 1, 2, 8, 9 and 10 of the present solicitation. Item 1 is identical in both instances, and we believe that on the basis of Pure Air's 1974 contract, the procuring agency could conclude that Pure Air was offering a product equal to Cambridge's on Item 1. As for Items 2, 8, 9 and 10, those items appear to be the same in 1976 as in 1974, except for slight changes in model numbers. Only by taking the view most favorable to Pure Air can it be said that Pure Air's 1974 contract shows that in its 1976 bid it offered "equal" products for Items 2, 8, 9 and 10.

As for Item 3 under the current IFB, Pure Air offered its model "1000C-95 NMP". The brochure enclosed with Pure Air's 1974 bid contains no description of this model, but does describe a model "NMP 1000-95" which has all the listed salient characteristics of the brand name product. There is nothing in this information which conclusively shows that the model "1000C-95 NMP" which Pure Air bid in 1976 is the same as the model "NMP 1000-95" described in its 1974 brochure.

Items 4 through 7 in the current solicitation consist of filters which are in rolls 65 feet long and are of varying widths. In 1974, as in 1976, Pure Air offered Drico products without supplying any descriptive literature thereon. Apparently Pure Air was not awarded a contract for these items in 1974 because it was not the low bidder for them. Again, there is nothing in Pure Air's bidding history which shows that the Drico filters have the same salient characteristics as those listed for the brand name item. Pure Air states in its protest that the filters are "covered by an N.B.S. [National Bureau of Standards] Test Report #3838." This report should have been submitted with or referred to in Pure Air's bid, if it serves to establish the equivalency of Drico's product.

Pure Air makes two other observations concerning Items 4 through 7 which merit separate comment. First, Pure Air states that the IFB is in error when it identifies Cambridge as the brand name manufacturer of these items (as well as Item 11), because the items are in fact manufactured by U.S. Gypsum and sold under the Cambridge brand name. Pure Air states that it is "patently invalid" to ask bidders to submit data showing their products are "equal" to those not even made by the brand name manufacturer.

We do not believe that this is a very substantive objection. It appears that these items have been solicited for at least the past three years as "Cambridge" items, and there is no indication that Pure Air or any other bidder was confused thereby. Moreover,

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we believe the "Brand Name or Equal" clause contemplates situations where one firm manufactures products to be sold under another's brand name. ASPR §1-1206.2(a) defines "brand name product" as a "commercial product described by brand name and make or model number or other appropriate nomenclature by which such product is offered for sale to the public by the particular manufacturer, producer, or distributor." If these roll filters are distributed as "Cambridge" filters, even though they are made for that firm by another, we think it is permissible to describe them as "Cambridge" products.

Pure Air's other observation concerning the roll filters appears to have more merit. Pure Air notes the inconsistency with which the procuring activity has described the width of these filters over the years, and suggests that the agency is confusing the nominal width with the actual width of these items. We note that in 1974, these filters were described as being 3, 4, 5 and 6 feet in width. In 1975, the filters were described in the IFB as being 32, 44, 56 and 69 inches wide. In 1976, the filters are again shown as being in widths of 3, 4, 5 and 6 feet. Pure Air states that, for example, a filter roll having a nominal width of 3 feet actually has a media width of 32 inches.

Since these are annually recurring procurements of filters to fit existing machinery, it does seem reasonable that the filter size should be uniform from year to year. We are suggesting to the procuring agency that it review its specification in this regard and clarify it in future similar procurements.

Item 11 of the present procurement consisted of disposable fiberglass filters. This item was not solicited in 1974. In both 1975 and 1976, Pure Air offered filters manufactured by AAA Air Filters. In neither case did Pure Air supply model numbers or descriptive literature. In its protest, Pure Air stated that the AAA filters were "covered by Federal Specification F-F 310A". Here, too, if Pure Air was offering filters which complied with a federal specification containing performance requirements equal to that of the Cambridge product, that fact should have been stated in Pure Air's bid.

Items 12, 13 and 14 were not solicited in the 1974 and 1975 procurements. The literature enclosed with Pure Air's 1974 bid describes two items of the same dimensions as Items 12 and 13, but having different performance characteristics. No item similar



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to Item 14 is described in the earlier literature. Under these circumstances, we do not believe the procuring activity was in a position to determine that Pure Air's products were "equal" to the brand name specified. Pure Air's protest is therefore denied.

The agency's rejection of Pure Air's bid was proper in view of the lack of reasonable availability of descriptive data for several of the items it offered. However, we share the local Staff Judge Advocate's concern with the suggestion in the file that Pure Air's bid be rejected for the additional reason that its past performance had been unsatisfactory. It appears that in the past, Pure Air had supplied filters with particle board housings which swelled when damp (making them difficult to remove) and which permitted the growth of mold, which was unacceptable for reasons of sterility. These problems can be avoided by the use of metal housings. As Pure Air points out, the housing material was not called out as a salient characteristic of the Cambridge product in these solicitations. We think there is merit to Pure Air's position that it should not be criticized for failing to provide a feature which was not identified as a salient characteristic of the brand name product.

Acting

*R. G. Kristman*  
Comptroller General  
of the United States



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

*Paul Sherry*  
*11/12/77*

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May 13, 1977

The Honorable Clifford L. Alexander, Jr.  
The Secretary of the Army

Dear Mr. Secretary:

Enclosed is a copy of our decision of today denying the protests of Pure Air Filter International and Thermal Control, Inc. under invitation for bids No. DART51-76-B-0236, issued at Ft. Bliss, Texas.

We believe the protesters' bids were properly rejected because the information reasonably available to the procuring activity was not adequate to establish that all of the products offered by the protesters were equal to the brand name items specified in the solicitation. However, we believe one of the protesters has identified two weaknesses in the solicitation specifications which should be corrected prior to the next solicitation.

It appears that four sizes of roll filters are being procured every year for use as replacements in existing air handling equipment, yet the specified width of the filters varies from year to year. Apparently, there is confusion as to whether the procuring activity is specifying the nominal or actual width of the filters. This potential cause of nonresponsive bids should be clarified in the next procurement.

We also note that the technical evaluator of the bids at Ft. Bliss was critical of Pure Air's past performance because that firm had supplied filters with an unsuitable housing material. The housing material has not been listed as a salient characteristic of the brand name item in past procurements. If the type of material represents an essential need of the Government, it should be listed among the salient characteristics in the "brand name or equal" purchase description.

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Please advise us of the steps taken to correct these deficiencies.

Sincerely yours,

  
Acting Comptroller General  
of the United States

Enclosure

cc: Colonel C.T. Lakes  
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