

DOCUMENT RESUME

02718 - [A1872920]

[Alleged Bid Handling Irregularities by Nonresponsive Bidders].
B-188486. June 29, 1977. 7 pp.

Decision re: Cummins-Wagner Co., Inc.; Joy Mfg. Co.; by Robert
P. Keller, Deputy Comptroller General.

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 Navy: Naval Surface
Weapons Center, White Oak Lab., Silver Spring, MD.

Authority: B-186941 (1977). B-174347 (1971). B-182840 (1975).

B-185664 (1976). B-186476 (1976). B-182063 (1974). B-174524

(1972). B-184734 (1975). 4 C.F.R. 20.2(b)(1). 55 Comp. Gen.

494. 49 Comp. Gen. 274. 49 Comp. Gen. 279. 50 Comp. Gen.

193. 50 Comp. Gen. 200. 50 Comp. Gen. 137. 50 Comp. Gen.

140. 55 Comp. Gen. 267. 55 Comp. Gen. 274. 41 Comp. Gen. 76.

45 Comp. Gen. 308. 45 Comp. Gen. 317. A.S.P.R. 7-2002.2.

A.S.P.R. 1-1206.1. A.S.P.R. 7-2003.10.

Two firms whose bids were found nonresponsive protested irregularities in bid handling. The firms bids were misplaced but were subsequently found. "Brand name or equal" requirement will not be questioned where solicitation list of essential characteristics was not extensive and did not reference Government specifications. Submission of manufacturer's name and/or model number without descriptive data rendered "equal" bid nonresponsive. Where descriptive data submitted deviated from specifications, blanket offer to comply with specifications did not cure the deviation. The protests were denied.

(Author/DJM)

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Proc II

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DECISION

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

FILE: B-188486

DATE: June 29, 1977

**MATTER OF: Cummins-Wagner Co., Inc.
Joy Manufacturing Company**

DIGEST:

1. Bid discovered missing during bid opening and found by bid officer, accompanied by bidder, in locked file drawer, may be considered for award. Postmark indicates bid was timely submitted by registered mail, and finding of second bidder's modification in same drawer supports conclusion that bid modification was mishandled by Government. In future, however, procurement officials alone should search for misplaced bids.
2. Use of "brand name or equal" provision in solicitation will not be questioned where IFB's list of essential characteristics is not extensive and IFB does not reference Government specifications. Moreover, protesters' argument that IFB description constitutes performance specification which negates reference to brand name and requirement for descriptive data is untimely when raised after bid opening.
3. Submission of manufacturer's name and/or model number, without descriptive data, renders "equal" bid nonresponsive. Government must be able to determine equality from data submitted or reasonably available.
4. Blanket offer to comply with specifications does not cure deviation from those specifications in descriptive data submitted with bid.

Cummins-Wagner Co., Inc. (Cummins) and Joy Manufacturing Company (Joy) have protested an award under invitation for bids (IFB) No. N60921-77-B-0030, issued by the Naval Surface Weapons

Center (NSWC), White Oak Laboratory, Silver Spring, Maryland. Cummins alleges irregularities in bid handling and both firms dispute the finding that their bids were nonresponsive.

The IFB, issued December 23, 1976, called for three packaged air compressors, Ingersoll-Rand Model 8 x 7 ESV-1P or equal, with drawings, and a sequence control system, Ingersoll-Rand Tendomatic Control Panel Model TD-320-3A or equal, to be supplied as a system. The IFB listed essential characteristics which would be used to evaluate "equal" products.

Representatives of Cummins, Joy, and the Ingersoll-Rand Company (Ingersoll-Rand) attended bid opening on February 3, 1977. As the names and addresses of bidders were being recorded, it became obvious that the Ingersoll-Rand bid was not among those in the bid box. While the assistant bid officer remained in the room, the bid officer, accompanied by the Ingersoll-Rand representative, searched for and found the missing bid in a locked file cabinet in an office adjoining the bid room. Despite objections, the bid officer, on advice of NSWC counsel, opened the bid and included it in the abstract with the notation "an apparent late bid." During recording of bid prices, a modification submitted by Joy, lowering its price, also was discovered to be missing; after bid opening it was found in the same file cabinet drawer.

Envelopes indicated that the Ingersoll-Rand bid had been sent by registered mail on January 25, 1977 and received in Silver Spring on January 26, 1977 and by the NSWC Supply Department on January 27, 1977, while the Joy modification had been sent by express mail on January 20, 1977 and received by the Administrative Department on January 21, 1977. The contracting officer determined that both bids should be considered for award. Of eight bids submitted, Cummins at \$37,015 was the low bidder, followed by Joy at \$37,573 and Ingersoll-Rand at \$37,986.

During technical evaluation, however, NSWC found both Cummins and Joy nonresponsive. For the air compressor, Joy had proposed its own WG-9 Air Pac, No. WGAP9 8 x7. One of the essential characteristics listed in the IFB was a 208 volt motor; descriptive literature submitted with Joy's bid showed a 460 volt motor as standard equipment. For the sequence control system, Joy had offered its own Model TD-320. Cummins had offered a product described only by the manufacturer's name, Travanini Engineering. Neither system was familiar to the evaluator, and because no brochures or catalogs had been submitted with the bids or were available at the White Oak Laboratory, both bids were rejected. On February 17, 1977, award was made to Ingersoll-Rand, which had offered the brand name equipment specified in the IFB.

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Initially, Cummins protests what it terms the "gross irregularities" which occurred in searching for and considering Ingersoll-Rand's apparently late bid. Cummins also objects because NSWC counsel personally agreed to investigate and report to bidders before award, but did not do so. The issue here is whether the bid was timely, and therefore for consideration, or whether the procedures followed were so improper that such consideration was barred.

The rule regarding late bids was set forth in the IFB, section C.1.2, incorporating the standard Armed Services Procurement Regulation (ASPR) § 7-2002.2 (1976 ed.), which states:

"* * *(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and either:

(i) it was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for the receipt of bids (e.g., a bid submitted in response to a solicitation requiring receipt of bids by the 20th of the month must have been mailed by the 15th or earlier); or

(ii) it was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

"(b) Any modification or withdrawal of bid is subject to the same conditions as in (a) above except that withdrawal of bids by telegram is authorized."

In this case, Ingersoll-Rand clearly submitted its bid by registered mail more than 5 days before the date specified in the IFB. But for the fact that the firm's representative accompanied the bid officer out of the room to search for the missing bid, there would be no question that it was properly considered. We have not been presented here with allegations of fraud, and the fact that Joy's modification subsequently was found in the same locked file cabinet as the Ingersoll-Rand bid supports the conclusion that both were misplaced by Government personnel. Both envelopes were sealed and the contents apparently

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unaltered. As for Joy's modification, the contracting officer has determined that its late receipt was due solely to mishandling by the Government. We therefore find that both Ingersoll-Rand's bid and Joy's modification were properly considered. See generally Hyster Company, 55 Comp. Gen. 267, 274 (1975), 75-2 CPD 176; H.A. Kaufman Co., B-186941, March 4, 1977, 77-1 CPD 162. In order to prevent even the appearance of impropriety, however, we suggest that if a similar situation arises in the future, procurement officials alone should attempt to locate missing bids.

The contracting officer characterizes the alleged promise of NSWG counsel to mail a personal report to bidders before award as a misunderstanding, and states that it was not incumbent on the Government to do more than make copies of a report prepared by the contracting officer available along with the abstract of bids. With regard to notifying other bidders that a late bid is being considered for acceptance, we have stated:

"* * * The fact that ASPR does not specifically provide for notice to bidders of a late bid being considered for award is not, in our view, a persuasive justification for failing to provide such information * * * [R]esponsible procurement officials should be sensitive to the position of the inquiring bidder and should reasonably respond to inquiries of this type * * *." ENSEC Service Corporation, 55 Comp. Gen. 494 (1975), 75-2 CPD 341.

Communication in this case appears to have been poor, and the officials concerned should have made sure that bidders understood where, when, and in what form the report would be available.

Turning to the protests regarding nonresponsiveness, both Cummins and Joy indicate that they did not submit descriptive data on their "equal" products because they regarded the specifications for this item as performance specifications. The desired characteristics were spelled out in such great detail in the IFB that all manufacturers would have been required to provide identical units, Cummins argues; the detailed description negates the reference to brand name, Joy contends.

The issue presented by these arguments is whether use of a "brand name or equal" purchase description was warranted, and if so, whether Cummins and Joy's bids were responsive to it. Under ASPR § 1-1206.1, a purchase description may be used in lieu of a

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specification where no applicable specification exists. A product or feature of a product peculiar to one manufacturer should not be specified, however, unless that feature is essential to the Government's minimum needs and similar products lacking it would not meet those needs.

Our Office has found that if a required item can be adequately described by a Government specification, without reference to a brand name, and if "equal" bids can be evaluated without descriptive data, a solicitation requiring such data is unnecessarily restrictive. 41 Comp. Gen. 76 (1961); see also B-174347, November 17, 1971. In 49 Comp. Gen. 274, 279 (1969) we objected to a "brand name or equal" provision in a solicitation for a 2,000 kilowatt electric generating plant. In that case, the technical requirements section of the applicable specification consisted of 36 pages, contained 116 numbered sections, and referenced numerous other Federal and military specifications and technical publications. While this is an extreme example, the instant case is clearly distinguishable. The list of salient characteristics in the IFB was not extensive. Only 14 salient characteristics were listed for both the air compressor and the sequence control system. Moreover, the IFB did not reference any Government specifications. See 50 Comp. Gen. 193 (1970), in which we rejected a protester's argument that the IFB's list of salient characteristics constituted a complete performance specification.

In any event, a bidder who participates in a "brand name or equal" procurement to the point of bid opening is deemed to have acquiesced in the evaluation of his bid, along with all others, under the criteria set out in the invitation. *Id.* at 200. Under our procedures, 4 C.F.R. 20.2(b)(1) (1977), Cummins and Joy's protests on this basis are untimely.

For the foregoing reasons, we will not now question NSWC's use of the "brand name or equal" provision. The rule regarding such bids was spelled out in IFB section C.7, incorporating ASPR § 7-2003.10, which states in pertinent part:

"* * *(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 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 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." (Emphasis added.)

Where, as here, the procuring activity in a "brand name or equal" solicitation goes beyond the make and model and specifies particular features, such features are presumed to be material and essential to the needs of the Government. Cummins Mid-America, Inc., B-185664, May 26, 1976, 76-1 CPD 343. Responsiveness of an "equal" bid depends upon the completeness of the information submitted or reasonably available. It is not enough that the bidder believes its product is equal; the Government must be able to determine equality. Ocean Applied Research Corporation, B-186476, November 9, 1976, 76-2 CPD 393. Therefore, listing of only the manufacturer's name and/or model number rendered the bids of both Cummins and Joy nonresponsive.

As for Joy's literature describing its standard air compressor as having a 460 volt motor, Joy contends that a transmittal letter, stating that the equipment was offered "in compliance with the specification," indicated an intent to comply with all requirements of the IFB, including the 208 volt motor. This statement should control over a printed description, Joy argues, and if there was an ambiguity, the contracting officer had a duty to resolve it with a clarifying telephone call.

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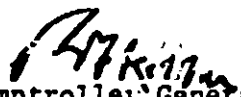
IFB section C.7, supra, stated that:

"* * * (2) If the bidder proposes to modify a product so as to make it conform to the requirements of the Invitation for Bids, he shall (i) include in his bid a clear description of such proposed modifications and (ii) clearly mark any descriptive material to show the proposed modification."

Thus, if Joy had intended to modify its engine to meet the specifications, it should have clearly indicated this on the descriptive literature submitted. See 45 Comp. Gen. 308, 317, (1965); Kam Equipment Company, B-182849, July 17, 1975, 75-2 CPD 43. A blanket offer to comply with specifications does not cure a deviation from those specifications in descriptive literature submitted with a bid. Big Joe Manufacturing Company, B-182063, November 14, 1974, 74-2 CPD 263. In this regard, see B-174524, January 26, 1972, in which the low, "equal" bid for furnishing two high frequency induction furnaces was held properly rejected because descriptive data submitted with it indicated that the converter was wired to operate from a 480 volt power source instead of a 440 source required by the IFB.

Finally, as to whether the contracting officer had a duty to telephone Joy and clarify any ambiguity, we have held that the procuring activity may use any descriptive data which was submitted with or identified in the bid, or otherwise reasonably and readily available. Lansmont Corporation, B-184734, October 9, 1975, 75-2 CPD 227. The information must be publicly available, however, and the Government is not required to expend unreasonable efforts to obtain descriptive data on an "equal" product. 50 Comp. Gen. 137, 140 (1970).

Accordingly, the protests are denied.


Deputy Comptroller General
of the United States