

7361
DECISION



E. P. L. 11, PL-1
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON 20548

FILE: B-190093

DATE: August 14, 1978

MATTER OF: Airway Industries, Inc.;
United States Luggage Corp.

DIGEST:

1. Bid samples furnished without interior graining, not listed as subcharacteristic of prescribed "interior appearance" criterion, could not be evaluated as required by solicitation for neatness and smoothness of interior appearance because samples could not demonstrate that with addition of graining bidder's product would retain requisite appearance. Procuring activity lacked reasonable basis to conclude samples complied with solicitation's subjective characteristics and was required to reject bid as nonresponsive to solicitation.

2. Agency's favorable consideration of bid samples furnished with note stating that although samples' interior did not comply with solicitation, production items would conform to specification, is tantamount to allowing bidder to submit additional samples after bid opening and violates rule that bid may not be altered after bid opening to make it responsive to solicitation.

3. While award of contract to bidder which submitted nonconforming bid samples on belief that bidder's production items would comply with solicitation specifications follows agency's internal regulations, such procedures violate statutory and regulatory requirements that award be made to responsible bidder whose bid conforms to the solicitation. 41 U.S.C. § 253(b) (1970).

4. Portion of protest concerning procuring activity's treatment of protester's bids in response to earlier solicitations which are not the subject of the protest here in question will not be addressed.

5. Assertion that protester previously furnished acceptable bid samples to procuring activity does not determine acceptability of samples submitted in response to instant solicitation, nor does acceptance of items on a prior contract bind agency to accept nonconforming items under a subsequent contract.

6. Protest against rejection of bid as nonresponsive because bid samples were found not to comply with objective characteristics listed in IFB is denied. IFB advised that nonconforming samples would require rejection of bid, tested samples manifested condition proscribed by IFB specification, and protester did not show its samples were not fairly evaluated by procuring activity.

7. Protest concerning validity of objective tests for bid sampling filed more than 5 months after bid opening is untimely as such procedures were readily apparent from examination of IFB.

Airway Industries, Inc. (Airway), and United States Luggage Corp. (USLC) have protested against the award of a contract for dispatch cases by the General Services Administration (GSA), Federal Supply Service, to Eastern Case Co., Inc. (Eastern), resulting from invitation for bids (IFB) No. FPGH-HH-90071-A.

The IFB, issued on June 16, 1977, contemplated the award of a requirements contract for molded plastic (metal frame) dispatch cases, National Stock Numbers (NSN) 8460-00-782-6726 and -6729, in accordance with Federal Specification KK-C-1535B, August 16, 1976, as modified, for the period of July 1, 1977, or the date of award, to June 30, 1978.

Bid samples were required to be furnished as part of the bids, and bids were to be rejected if the samples failed to conform to specified characteristics. Federal Procurement Regulations (FPR) § 1-2.202-4 (1964 ed. amend. 139). The IFB contained a Bid Sample Requirements clause which provided, in pertinent part, as follows:

- "a. Two bid samples are required for each of the following items in this solicitation:

NSN-8460-00-782-6726, NSN-8460-00-782-6729

- "b. Two representative samples shall be submitted for each of the following items bid upon:

<u>ITEMS</u>	<u>ACCEPTABLE REPRESENTATIVE SAMPLE</u>
<u>1-14</u>	_____
<u>15-28</u>	_____

* * * * *

- "c. Samples will be evaluated to determine compliance with all characteristics stated below:

Subjective Characteristics

a. Workmanship

b. Convenience of Carrying

c. Stability while standing

d. Exterior appearance

e. Interior Appearance

(i) General

Matching color of apron with interior

Objective Characteristics

a. Drop Test (Para. 4.3.2) Fed. Spec. KK-C-1535B

b. Tumble Test (Para. 4.3.3) Fed. Spec. KK-C-1535B

(ii) Unlined

Neatness & smoothness of visible interior with no evidence of sharp jagged or rough unfinished components

(iii) Lined

Harmony of color with exterior ease of removal

Unit-price bids were to be submitted, f.o.b. 14 destinations, for estimated quantities of NSN-6726 (items 1-14) and NSN-6729 (items 15-23). Four bids were received at the bid opening on July 26, 1977. The low bidders for NSN-6726 were: Airway on items Nos. 2 and 3, USLC on item No. 13, and Eastern on the remaining 11 items. For NSN-6729, Airway was the low bidder on items Nos. 16 and 17, USLC on items Nos. 15, 23, 24 and 27, and Eastern on the remaining eight items.

GSA requested a preaward survey of Eastern's facilities, pursuant to FPR § 1-1.1205-4 (1964 ed. amend. 95); General Services Procurement Regulation (GSPR) § 5A-1.1205-4 (1976 ed.), on August 22, 1977. The Plant Facilities Report (PFR) dated September 2, 1977, found the firm capable of performing under the IFB.

BID SAMPLE EVALUATIONS

According to a GSA memorandum dated October 4, 1977, subjective tests were performed on the bidders' samples on August 8, 1977, with the following results:

"1. Airway Industries 5" & 3"----Passed

"2. U.S. Luggage 5" & 3" ----Passed*

*NOTE--Lock is of the Lunch Box type and should be checked out under objective tests.

"3. Eastern Case Company 5" & 3"----Passed*

*It was noted in bid samples submitted by Eastern: 'The bid sample does not have a grained interior. Production cases will have a grained interior as per specification.'

"This can be corrected in production and the manufacturer encounters no problem in production."

GSA's Bid Sample Evaluation Report, dated August 25, 1977, concluded with respect to the above-quoted objective characteristics that the samples of Airway, Eastern and USLC for NSN-6726 did not comply with the specification requirements. More specifically, Airway's initial sample failed the Tumble Test because a latch opened during the test (Federal Specification KK-C-1535B (Fed. Spec.) para. 3.3.5, August 16, 1976), and Eastern's lid shell separated from the frame section of the case (Fed. Spec., para. 3.3.2); the bidders' second sample, however, passed the test. USLC's sample failed the Drop Test because the case evidenced dimpling on the corners (Fed. Spec., para. 3.3.2) and deficiencies were also noted concerning the case latches and feet (Fed. Spec., paras. 3.3.5.3 and 3.3.9). The Airway and Eastern samples for NSN-6729 were found to comply with the specification requirements, but USLC's sample failed to comply for the same reasons stated with regard to the firm's sample for NSN-6726.

The following statement concerning interior graining, apparently directed at the note affixed to Eastern's sample, was added to the above-quoted October 4 memorandum by GSA's memorandum of October 14, 1977.

"The requirements for the appearance of the grained interior of the unlined molded plastic dispatch cases are set down in paragraph 3.3.6.1 of Fed. Spec. KK-C-1535B, and must be adhered to in manufacturing production items for delivery in accordance with a contract.

"In evaluating the subjective characteristics of bid samples of Molded Plastic Dispatch Cases no consideration of the grained unlined interior of the cases is listed in Solicitation No. FPGA-HH-90071-A-7-26-77.

"A potential supplier would have no trouble meeting this requirement in production by either graining the interior of the case concurrent with the molding of the plastic shells or by using sheets that have been grained prior to molding the shells."

On the same day GSA requested an additional PFR as to Eastern's capability to furnish the prescribed case interior. See GSPR § 5A-2.202-4(g) (1976 ed.). The report, dated October 20, 1977, concluded that an inspection of the firm's plant indicated Eastern was capable of producing cases in compliance with paragraph 3.3.6.1 of the applicable specification (i.e., with grained interior).

During the interim the bidders complied with GSA's request for extension of the acceptance period of their bids. On December 19, 1977, however, GSA issued a Determination and Findings of urgency, FPR § 1-2.407-8(b)(4) (1964 ed. amend. 68), pursuant to which a contract for items 2, 3, 16 and 17 was awarded to Airway and a contract for the remaining 24 items was awarded to Eastern on December 23, 1977. By letter dated January 6, 1978, GSA notified USLC that its bid had been rejected as nonresponsive because the firm's bid samples failed to conform to the specification requirements.

AIRWAY INDUSTRIES PROTEST

On September 9, 1977, Airway filed its protest with our Office against the award of a contract under the IFB to any other bidder on the grounds that Eastern's bid samples failed to meet the requirements of the IFB and the applicable Federal specification. More specifically, Airway asserts that:

1. Eastern's bid samples do not conform to the dimensions required by paragraph 3.3 of the Federal specification; differences in dimensions of bid samples and production items could produce different test results; thus, there is no guarantee that production items would have passed the objective tumble test. Prior Eastern samples of the required dimensions did not consistently pass the tumble test.
2. The note pasted in Eastern's samples indicates that the samples do not meet the IFB's subjective characteristics for interior appearance. The IFB requires unlined cases have a neat, smooth visible interior free from rough jagged or rough finished components and the Federal specification defines

"neatness" to require a "uniform grain." Samples furnished without graining cannot be inspected for appearance and should be rejected as failing to comply with the listed subjective characteristics.

3. Eastern's samples do not comply with the requirements for "workmanship," Federal specification, para. 3.5, because they do not present the requisite material, interior and exterior appearance, and locks, which affect the product's serviceability and appearance.

GSA, however, takes the position that (1) neither case dimensions nor grained interior is included in the subjective characteristics listed in the IFB, (2) lack of grained interior is a defect easily subject to correction in production, and (3) Eastern's samples are deemed to comply with the IFB.

Initially, we agree that case dimensions were not included among the subjective characteristics for which bid samples were to be evaluated. Insofar as Airway has merely alleged, without proving, that Eastern's bid samples fail to comply with the required dimensions and workmanship, we will neither speculate as to their compliance nor substitute our judgment for that of the GSA evaluators.

Although interior graining was not specifically listed as a subcharacteristic under any of the subjective characteristics set forth in the IFB, we cannot concur with GSA's delimitation of the scope of bid sample evaluation for interior appearance. We believe that the agency's interpretation fails to consider the integral correlation between the IFB and the applicable Federal specification. The purpose of listing sample evaluation criteria is to advise prospective bidders of the standards against which their bid samples will be evaluated.

Paragraph 3.3.6 of the Federal specification gave bidders the choice of furnishing cases with either lined or unlined interior, as specified in paragraph 3.3.6.1

or 3.3.6.2. Paragraph 3.3.6.2, Unlined Interior, required in part that:

"[b]oth top and bottom finished interior surfaces shall be grained prior to or concurrent with the molding process and, after molding, shall result in a uniform grain. * * * * *

According to paragraph 3.3.6, samples were to be evaluated for either subjective characteristic paragraph (e) (ii) or (e)(iii), above, because bidders were required to furnish either lined or unlined interior, not both.

Paragraph (e)(ii) of the above-quoted IFB subjective characteristics states that the bid samples were to be evaluated for "unlined neatness and smoothness of visible interior with no evidence of sharp jagged or rough unfinished components." (Emphasis added.) Notwithstanding the fact that graining might readily be supplied during the production process, we believe that the neatness and smoothness of unlined, grained interior cannot be determined by examining bid samples with unlined, ungrained interior. The fact that Eastern's bid samples presented a neat, smooth interior did not suffice to indicate that with the addition of graining Eastern's production items would retain the requisite interior appearance. Because Eastern's samples could not adequately demonstrate the characteristic listed for evaluation, GSA had no reasonable basis upon which to determine that the firm's samples complied with the subjective characteristics of the IFB and was required to reject Eastern's bid as non-responsive.

Moreover, we have long followed the rule basic to competitive bidding that a bid may not be altered after bid opening in order to make it responsive to the solicitation. 40 Comp. Gen. 432, 435 (1961). Because bid samples are part of the bid, the same rationale applies to changes in bid samples subsequent to bid opening. Kaufman DeDell Printing, Inc., B-181231, March 24, 1975, 75-1 CPD 172.

The responsiveness of Eastern's bid, that is, the firm's intention to comply with all IFB specifications, must be determined from the company's actual bid and bid samples. See B-176699, November 30, 1972; Sheffield Building Company, Incorporated, B-181242, August 19, 1974, 74-2 CPD 108. Consideration of Eastern's bid samples as if they had been furnished with the interior proposed by the attached note was tantamount to allowing the bidder to submit a second set of bid samples after bid opening. See 40 Comp. Gen. 432 (1961); Sheffield Building Company, Incorporated, supra; Kaufman DeDell Printing, Inc., supra. GSA's favorable evaluation of Eastern's samples is particularly egregious because the agency was expressly advised that the samples did not comply with all the specifications of the IFB and, therefore, made its evaluation in reliance on the belief that production items would somehow be made to conform after a contract had been awarded.

Bid samples are permitted in order to determine the responsiveness of a bid and may not, as a general rule, be used for determining a bidder's ability to produce the required item. FPR § 1-2.202-4(a) (1964 ed. amend. 10); B-164732, September 30, 1968; D.N. Owens Company, B-190749, January 25, 1978, 78-1 CPD 66. Where, as here, a bid may properly be rejected as nonresponsive, neither a determination as to the bidder's responsibility nor a preaward survey preparatory to such a determination is necessary. Seal-O-Matic Dispenser Corporation, B-187199, June 7, 1977, 77-1 CPD 399. The problem with GSA's evaluation procedure and its treatment of bid samples lies with its own internal regulations found at GSPR § 5A-2.202-4 (1976 ed.). Under those regulations, if bid samples have been found in compliance with all the listed characteristics of the IFB, but deficient with regard to unlisted characteristics, GSA must request a PFR. GSPR § 5A-2.202-4(g) (1976 ed.). Unlike the ordinary treatment of bid samples, a request for a PFR is properly made for the purpose of determining a bidder's ability to produce a conforming item (i.e., an affirmative determination of responsibility) and requires specific statements regarding the bidder's "ability * * * to correct each noted deficiency in objective characteristics as well as an overall appraisal of his capability." FPR § 1-1.1205-4 (1964 ed. amend. 95); GSPR § 5A-2.202-4(g) (1976 ed.). (Emphasis added.)

The problems inherent in the current GSA bid sample evaluation process, as we see them, are as follows:

- (1) Solicitation evaluation characteristics are not sufficiently detailed to accurately apprise bidders of the standards against which bid samples are to be evaluated.
- (2) Evaluations conducted according to currently used characteristics fail to consider salient product features prescribed by the controlling Federal specification.
- (3) Further testing of bid samples whose nonconformity is apparent from visual inspection (subjective testing stage) needlessly prolongs sample evaluation and the entire procurement process, often requiring the extension of bids for no useful purpose.

Furthermore, we can find no reasonable basis in fact in the record for GSA's consideration of Airway or Eastern as eligible for award of a contract for any of items 1 through 14 (i.e., NSN-6726). As mentioned above, according to GSA's own evaluation memorandum of August 25, 1977, neither firm's bid sample for NSN-6726 complied with the objective characteristics listed in the IFB. The tests were, however, repeated with satisfactory results on another set of the bidders' samples. While the reason for which a second round of tests was administered is not clear, we note it as a further example of the unnecessarily extended evaluation process which characterizes the instant procurement, a concern which we will address below. Because the firms' bid samples for NSN-6726 clearly did not conform to all the evaluation characteristics listed in the IFB, GSA was required to reject their bids as nonresponsive. The conflicting test results do not affect the procuring activity's obligation in this regard because they merely render the bids, at best, ambiguous. In a procurement by formal advertising, award must be made to the responsible bidder whose bid, conforming to the IFB, will be most advantageous to the Government. 41 U.S.C. § 253(b) (1970). (Emphasis added.) The contracts awarded to Airway for items 2 and 3 and to Eastern for items 1 and 4 through 14 were, therefore, awarded in contravention of the terms of the IFB and in violation of pertinent procurement law and regulations.

Similarly, items 15 and 18 through 28 of Eastern's bid were supported by bid samples which failed to comply with the interior graining requirement of the IFB. Eastern's nonconforming bid samples required rejection of the firm's bid as nonresponsive. Consequently, GSA's award to Eastern for these items was also made in violation of controlling procurement law and regulations.

Accordingly, the protest is sustained. We are unable to recommend corrective action with regard to the base-period portions of the contracts, which have already been performed. We learned, however, on July 7, 1978, that GSA has exercised a 2-month option which extends the term of the contracts through August 31, 1978. We therefore recommend that no further orders for items 2 and 3 should be placed with Airway, no orders for items 1, 4 through 15, and 18 through 28 should be placed with Eastern under the option, and any new requirements should be solicited in a manner consistent with this decision.

UNITED STATES LUGGAGE CORPORATION PROTEST

USLC essentially contends that its bid was improperly rejected as nonresponsive because its bid samples were not properly evaluated by GSA. The protester questions the validity of the objective Drop Test, noting that previous sample cases were submitted without any adverse report; states that the specification is ambiguous with regard to the locks and latches to be furnished, and that sample cases equipped with the identical lock were not rejected on that basis; and alleges that GSA's actions evidence a longstanding course of conduct by the agency, intended to discourage USLC from competing on similar future solicitations.

Initially, USLC's concern with regard to the validity of the objective tests used by GSA questions the propriety of procedures, the use of which was readily apparent from an examination of the IFB. However, according to our Bid Protest Procedures, 4 C.F.R. § 20.2 (b)(1) (1977 ed.), protests based upon such an alleged impropriety must be filed with our Office prior to bid opening. Because USLC filed its protest more than 5 months after the bid opening, this ground of the protest is untimely filed and will not be considered on the merits. See B-176210, February 2, 1973.

Insofar as USLC's protest pertains to GSA's treatment of USLC bids in response to solicitations issued prior to the IFB here in question, those aspects of the protest will not be addressed because they do not concern the instant procurement and protests filed against them at this juncture would be untimely filed and not for consideration on the merits. 4 C.F.R. § 20.2 (1977 ed.).

In support of the exception taken to GSA's evaluation of its bid samples, USLC states that samples previously furnished to GSA have passed the Drop Test and that sample cases equipped with the same latch were not previously rejected on that basis. The fact that USLC may have previously furnished an acceptable item under an earlier GSA procurement is not, however, determinative of the acceptability of samples submitted in response to the instant IFB. Seal-O-Matic Dispenser Corporation, supra; R & O Industries, Inc., B-180157, April 30, 1974, 74-1 CPD 221; B-176262, December 4, 1972. Even the acceptance of nonconforming items on a prior contract does not bind the procuring activity to accept nonconforming items under a subsequent contract. Lasko Metal Products, Inc., B-182931, August 6, 1975, 75-2 CPD 86.

USLC further asserts that its bid in response to the instant IFB was wrongfully rejected on the basis of GSA's improper evaluation of the firm's bid samples. GSA, however, takes the position that the samples were evaluated in accordance with the terms of the IFB. As GSA notes, we feel that procurement officials are better qualified than our Office to evaluate bid samples' compliance with the characteristics prescribed in solicitations. Consequently, we will not substitute our judgment for that of the contracting agency unless the record establishes that the agency's judgment was without basis in fact. Lasko Metal Products, Inc., supra; R & O Industries, Inc., B-183688, December 9, 1975, 75-2 CPD 377.

GSA rejected USLC's bid because the firm's bid sample did not comply with the IFB's objective characteristics, i.e., the case dimpled at the corners subsequent to the Drop Test. Paragraph 3.3.2 of the Federal specification expressly provides that when sample cases

undergo the Drop Test they "shall show no evidence of corner dimpling." Moreover, USLC, despite its disagreement with the evaluation, has not shown that the samples were not fairly evaluated by GSA. We are, therefore, unable to conclude from the record that GSA's determination that USLC's samples failed to comply with the requirements of the objective test was without a reasonable basis in fact. Products Engineering Corporation, B-185722, June 25, 1976, 76-1 CPD 408. Accordingly, USLC's protest is denied.

Notwithstanding the fact that GSA could properly reject USLC's bid as nonresponsive on the basis of the aforementioned objective test results, we believe that confusion arose from the inclusion of GSA's remarks concerning additional sample deficiencies, not pertinent to the objective characteristics listed in the IFB, in GSA's October 4 memorandum and notice of award. Contrary to the above-quoted portion of the October 4 memorandum, any deficiency concerning the case latches was not properly for consideration with reference to the objective tests. In fact, the specification's sole testing provision regarding these items, paragraph 3.3.5, merely requires that "[l]atches and locks shall remain closed and locked when being tested * * * * [and after testing] shall remain operable." Because GSA did not find that the USLC sample latches opened or became inoperable after testing, their configuration alone could not properly serve as a basis for determining that the samples did not comply with the IFB's objective characteristics. Although configuration of the latches might be subsumed in the subjective characteristic of "exterior appearance," GSA found, according to its August 25 memorandum, that the protester's samples met the enumerated subjective characteristics. Similarly, the manner in which the feet were secured to sample cases was not even mentioned in the subjective test results, nor was it relevant to the IFB's objective characteristics.

The purported deficiencies noted by GSA were, or should have been, apparent from visual inspection of the bid samples. Assuming, arguendo, that these deficiencies indicate that USLC's product, as represented by the bid samples, does not comply with the Federal specification, USLC's bid should have been rejected as

nonresponsive without subjecting the samples to the subjective or objective tests. No useful purpose can be served by adducing additional reasons for which the bid sample and bid are nonresponsive to the requirements of the IFB. Under such circumstances, the time, effort and expense involved in prolonging sample evaluation and the overall procurement process, including the extension of bids, are needlessly expended.

Even if GSA considered these deficiencies minor or waivable, which appears inapposite to the tenor of the memoranda and notice of award, that possibility raises the question of whether the Federal specification and IFB actually overstated the procuring activity's minimum needs. However, because GSA had a reasonable basis in fact upon which to reject USLC's bid as nonresponsive, we find it inappropriate to pursue this issue.

For the foregoing reasons, we are recommending to GSA that bid sample testing procedures be implemented which will provide for the termination of testing at the earliest stage at which it becomes apparent that bid samples do not comply with applicable specifications or characteristics of a solicitation, thus requiring rejection of bids in support of which the samples have been submitted. We will also consider the matter in connection with our audit functions.

As this decision contains a recommendation for corrective action, it is being transmitted by letter of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

Deputy


Comptroller General
of the United States