

DOCUMENT RESUME

02660 - [A1672657]

[Protest against Finding of Nonconformance with Specifications].
B-187199. June 7, 1977. 6 pp. + enclosure (1 pp.).

Decision re: Seal-O-Matic Dispenser Corp.; by Robert F. Keller,
Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel; Procurement Law I.

Budget Function: General Government: Other General Government
(806).

Organization Concerned: Allway Tools, Inc.; Federal Supply
Service.

Authority: 41 U.S.C. 253(b). B-184446 (1976). D-162931 (1975).
B-181760 (1974). B-183683 (1975). B-176262 (1972). B-180157
(1974). F.P.R. 1-1.1205-4 (amend. 95). F.P.R. 1-1.708-2(a)
(amend. 71). General Services Procurement Regulation
5A-1.1205-4. General Services Procurement Regulation
A-1.701.

Bidder protested award of requirements-type contract to
supply knives and blades. The bid was rejected as nonresponsive
where submitted sample deviated from dimensions required by
specifications, and where nonconforming sample was submitted for
bid on different item when both had to conform to same
specification. That identical item was allegedly supplied on
prior contract did not thereby render it acceptable for instant
solicitation. (DJM)

Eileen Pettit

Proc. I

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



DECISION

FILE: B-187199

DATE: June 7, 1977

MATTER OF: Seal-O-Matic Dispenser Corporation

DIGEST:

1. Contracting officer properly relied upon bid sample evaluation in rejecting as nonresponsive protester's bid for item for which sample was required, where solicitation provided that failure of sample to conform to prescribed characteristics in specification would require rejection of bid and protester's bid sample deviated from required dimensions of agency's specification.
2. Assertion that protester allegedly supplied identical item on prior contract does not determine acceptability of samples submitted in response to instant solicitation, nor does agency acceptance of nonconforming items on a prior contract bind agency to accept nonconforming items under a subsequent contract.
3. Agency properly rejected protester's bid as nonresponsive on basis of nonconforming bid sample submitted for bid on another item where both items were required to conform to same solicitation specification. Bid was, at best, ambiguous as nonconforming bid sample indicated protester's exception to specification.

Seal-O-Matic Dispenser Corporation (Seal-O-Matic) has protested the award of several items to Allway Tools, Inc. (Allway), by the Federal Supply Service (PSS), General Services Administration (GSA), resulting from invitation for bids (IFB) No. FTAP-A2-60409-A-3-2-76. The solicitation contemplated a requirements-type contract to supply various types of knives, blades and machetes (FSC-5110).

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Item 14 of the IFB, issued by GSA on January 30, 1976, called for blades, National Stock Number (NSN) 5110-00-293-2865 to be manufactured "[i]n accordance with Federal Specification GGG-K-494b, dated 4/10/74 and Interim Amendment 1, dated 8/9/74," to be used in general purpose shop knives. Item 15 called for general purpose shop knives, NSN 5110-00-891-5071, to be furnished with five interchangeable blades. The IFB contained a Bid Sample Requirement Clause (Article 218), which provided in pertinent part as follows:

"(a) Two bid samples are required for each of the following items in this Invitation for Bids: 15, 23 and 27

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

<u>ITEMS</u>	<u>ACCEPTABLE REPRESENTATIVE SAMPLES</u>
<u>15</u>	_____
_____	_____
* * * * *	

"(c) Samples will be evaluated to determine compliance with all characteristics listed below:

<u>SUBJECTIVE CHARACTERISTICS</u>	<u>OBJECTIVE CHARACTERISTICS</u>
<u>WORKMANSHIP</u>	<u>BLADE DIMENSION (ITEM 15)</u>
<u>Para. 3.11 - GGG-15-494b,</u>	<u>INTERIM AMENDMENT NO. 1</u>
<u>Dated 4/10/74 (Item 15)</u>	<u>OF GGG-K-494a</u> "
<u>Para. 3.5 GGG-K-484d, dated</u>	
<u>9/14/66 (Item 23 and 27)</u>	

GSA notes that paragraph (c), above, contains a typographical error; the specification number listed under Objective Characteristics should have read GGG-K-494b. There is, in fact, no Amendment No. 1 to the specification listed in error. Article 215, paragraph b of the IFB provides that upon evaluation, "[f]ailure of samples to conform to all such characteristics will require rejection of the bid."

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Bid opening, originally scheduled for March 2, 1976, was extended by amendment to March 26, 1976. GSA received the following unit-price bids for items 14 and 15:

<u>Bidder</u>	<u>Item 14</u>	<u>Item 15</u>
Garvey Labelmatic (Garvey)	0.165	0.65
Seal-O-Matic	0.188	0.789
Evans Rule Co. (Evans)	0.19	0.79
Allway	0.19	0.80
Wein Hardware Co.	0.48	1.34

An FSS Quality Control Division inspector evaluated the bidders' samples for item 15; he noted in his evaluation report, dated April 13, 1976, that the blades submitted by Garvey, Seal-O-Matic, and Evans did not conform to the specified dimensions. GSA's contracting officer therefore rejected as nonresponsive the three lowest bids for item 15. Because the specifications for blades for items 14 and 15 were identical, the contracting officer also rejected as nonresponsive the bids of Garvey, Seal-O-Matic, and Evans for item 14 on the basis of their bid samples for item 15. Award of items 14 and 15 was made to Allway, and Seal-O-Matic was notified by letter of July 19, 1976, that its bid on both items had been rejected for failure to comply with applicable specifications.

Seal-O-Matic protested the rejection of its bid to GSA by letters of July 22, 1976 and August 5, 1976, to which the agency responded by letters of August 4 and August 19, 1976, reiterating the reasons for which the bid was rejected. Seal-O-Matic filed its protest with our Office on August 11, 1976. In essence, the protester contends that its blade and bid sample not only meet, but also exceed, the specification requirements. In support of this contention, Seal-O-Matic asserts that its bid was improperly rejected because its blade "will fit any knife on the market in the same category * * *," that it has been supplying the same blade to the Government for over 1 year under a previous contract, and that the Government will not be placed at a disadvantage by accepting its blade and knife merely because the blade dimensions differ from those required by the specification.

The instant specification, GCG-K-494b, as amended, was developed in 1974 as the result of an FSS standardization process undertaken in order to facilitate procurement of knives and blades which would be interchangeable with the supplies already in use in the Federal Supply System. FSS, therefore, developed a standard blade, the dimensions of which are set forth in Interim Amendment No. 1. We have consistently taken the position that the preparation and establishment of specifications to reflect the Government's needs are matters primarily within the jurisdiction of the procuring activity, which will not be disturbed by our Office unless clearly shown to be without a reasonable basis. See, e.g., Bayshore Systems Corporation, B-184446, March 2, 1976, 76-1 CPD 146 and cases cited.

The administrative report shows that Seal-O-Matic's bid sample for item 15 was rejected because it "fail[ed] blade dimensions in the vicinity of center hold due to metal being removed in excess of specified dimensions for hold length and width." Seal-O-Matic's blade-hole width nearest the side opposite the cutting edge of the blade was 0.265 inch, rather than the 0.192 inch required by the specification. Allowing for the permissible tolerance of one one-thousandth inch, the sample still exceeded the specification by 0.072 inch. The record, however, is silent concerning any deviations from the prescribed hole length. We feel that procurement officials are better qualified than our Office to review and evaluate the sufficiency of bid samples to determine whether they comply with solicitation criteria. Our Office will, therefore, refrain from taking exception to such determinations unless the record establishes that such judgments were without adequate basis. See, e.g., Lasko Metal Products, Inc., B-182931, August 6, 1975, 75-2 CPD 86; Boston Pneumatics, Inc., B-181760, November 15, 1974, 74-2 CPD 265. We are unable to conclude on the basis of the record that the determination that Seal-O-Matic's bid sample failed to conform to the dimensions of the applicable specification was without an adequate basis. Because the IFB specifically provided that failure of the samples to conform to the prescribed characteristics would require rejection of the bid, the contracting officer properly relied upon the reported evaluation results in rejecting Seal-O-Matic's bid for item 15 as nonresponsive. R & O Industries, Inc., B-183688, December 9, 1975, 75-2 CPD 377.

Seal-O-Matic additionally asserts that it has previously furnished the identical blade on a prior contract. GSA, however, states that "* * * there is no record that the blade in question was ever supplied to this agency under Interim Amendment 1." Although the record is unclear with regard to this contention, it is our position that the fact that Seal-O-Matic has previously furnished an acceptable item under an earlier procurement is not determinative of the acceptability of samples submitted in response to the instant solicitation. B-176262, December 4, 1972; R & O Industries, Inc., B-180157, April 30, 1974, 74-1 CPD 221. Similarly, 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., supra.

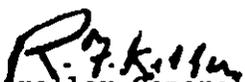
Seal-O-Matic's bid on item 14 was rejected as nonresponsive on the basis of the sample submitted for item 15, notwithstanding the fact that the IFB did not require that samples be submitted for item 14. Because both items 14 and 15 were required to conform to the aforementioned specification, the contracting officer reasoned that the protester would furnish blades for item 14 identical to the nonconforming bid sample for item 15. In retrospect, GSA states, that the contracting officer improperly rejected Seal-O-Matic's bid for item 14. We cannot agree with GSA.

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). As mentioned above, the blades included in the protester's bid sample for item 15 did not conform to the dimensions of the amended specification. The specification was an essential requirement of the IFB, and blades to be furnished for item 14 were also required to conform to that same specification. Although no specific exception was taken to the prescribed blade dimensions, it is our opinion that, at best, Seal-O-Matic's bid for item 14 was ambiguous. It was not clear whether the bid constituted an unqualified offer to comply with the applicable specification. The specification set forth the minimum acceptable blade dimensions; the bid sample, therefore, indicated an exception to the specification. For the foregoing reasons, we are unable to conclude that GSA acted without a reasonable basis in rejecting Seal-O-Matic's bid on item 14 as nonresponsive.

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Accordingly, and in view of all of the above, the protest is denied.

We note that GSA requested a preaward survey of the protester's facilities, pursuant to Federal Procurement Regulations (FPR) § 1-1.1205-4 (1964 ed. amend. 95); General Services Procurement Regulation (GSPR) § 5A-1.1205-4 (1975 ed.), on April 16, 1976. The survey report concluded that Seal-O-Matic was not capable at that time of producing blades in conformance with the pertinent specification, although we note that this conclusion appears to be inconsistent with other findings included in the report. Because we have found that Seal-O-Matic's bid for items 14 and 15 was properly rejected as nonresponsive, neither a determination as to the protester's responsibility nor a preaward survey preparatory to such a determination was necessary. However, once GSA undertook to have the survey conducted and found the protester nonresponsive as to capacity, the agency was required to notify the Small Business Administration (SBA) of that finding in order to provide SBA an opportunity to issue a certificate of competency. FPR § 1-1.708-2(a) (1964 ed. amend. 71); GSPR § 5A-1.701 (1975 ed.). GSA, however, failed to provide the requisite notice. In view of the fact that GSA properly rejected the protester's bid as nonresponsive, we do not feel it appropriate or necessary to recommend corrective action in this regard. However, we are calling this deficiency to the attention of the GSA Administrator


Deputy Comptroller General
of the United States



Eileen Pettit
Proc. I

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

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JUN 1 1977

The Honorable Joel W. Solomon
Administrator, General Services
Administration

Dear Mr. Solomon:

Enclosed is a copy of our decision of today denying the protest of Seal-O-Matic Dispenser Corporation against the award of a contract by the Federal Supply Service, General Services Administration, under invitation for bids No. FYAP-AZ-60409-A-3-2-76, to Allway Tools, Inc.

As indicated in the decision, the protester's bid for the items in question was properly rejected as nonresponsive; a preaward survey and determination as to the protester's responsibility were, therefore, unnecessary. However, where such a survey has been properly conducted and the bidder has been found nonresponsive as to capacity, it is incumbent upon the procuring activity to notify the Small Business Administration of that finding in order to provide an opportunity for the issuance of a certificate of competency. The General Services Administration failed to furnish the requisite notice in the instant procurement. We bring this matter to your attention, notwithstanding the extenuating facts of the protest, in order to prevent recurrence of this deficiency where the procedure is applicable. We therefore suggest that a procedure ensuring notification of the Small Business Administration be instituted for use in future procurements.

Sincerely yours,

R.F. KILLER
Deputy
Comptroller General
of the United States

Enclosure

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