

J. Notopoulos
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DECISION

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

9015

FILE: B-192126

DATE: February 1, 1979

MATTER OF: New Britain Hand Tools Division,
Litton Industrial Products, Inc.

DLG00394

[Protest of Requirements-Type Contract Award]
DIGEST:

DLG00796

1. Where samples submitted with low offer were evaluated against listed sample evaluation characteristic and found acceptable, offer properly was accepted even though sample failed to comply with unlisted characteristics since offeror is not relieved from furnishing items fully in accord with specifications by submitting noncompliant sample.

2. While evaluation of bid sample for "appearance" is dependent upon whatever precise factors, such as requirement for "graining", make up overall appearance, "workmanship" is more general characteristic to be determined by manner in which maker of item conforms to a quality standard. Consequently, sample which is submitted for evaluation of "workmanship" need not be rejected because of its noncompliance with certain design requirement. Airway Industries, Inc., et al., 57 Comp. Gen. 686 (1978), 77-2 CPD 115 distinguished.

3. Failure to obtain plant facilities report prior to award for purpose of determining responsibility of successful offeror was procedural defect which does not require disturbing award as protester was not prejudiced. Signing of contract may be deemed to be affirmative determination of responsibility by contracting officer.

New Britain Hand Tools Division, Litton Industrial Products, Inc. (Litton) protests the award of a requirements-type contract to American Kal Enterprises, Inc. (American) for item 3 (socket wrench sets) under Request for Proposals (RFP) FTAN-E5-10016-N-5-78, issued

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by the General Services Administration (GSA), Federal Supply Service. The contract was awarded on May 27, 1978 and expires on February 28, 1979.

The question in this case concerns GSA acceptance of the "bid sample" of the metal cases for the wrench sets submitted by American pursuant to the "bid sample" clause of the solicitation. The sample cases did not conform to the design requirements of the specifications and Litton contends GSA had no reasonable basis for concluding that the samples submitted under American's low offer complied with listed sample evaluation characteristics. Specifically, Litton argues that American's sample tool cases were fitted with two short hinges instead of the six inch continuous (piano) hinge required by the specified design. Hence, Litton contends the American offer was "nonresponsive."

Litton also asserts that certain provisions of the General Services Procurement Regulations (GSPR) pertaining to the use of a plant facilities report (PFR), a device for determining an offeror's responsibility, were violated by GSA because the PFR was obtained after award and then was used, in effect, to make American's offer "responsive."

The solicitation was originally issued by GSA as an invitation for bids (IFB) and was subsequently reissued as a negotiated procurement when no bids were received for the item in question here. The bid sample clause used in the solicitation, quoted below, obviously was intended for use in formally advertised procurements. However, we have recognized the use of "bid" sample requirements in negotiated procurements to determine the acceptability of supplies to be furnished under a contract in instances where it is determined that the specification is not sufficiently definite to allow a determination, without samples, that an item offered will meet the Government's minimum needs. Aul Instruments, Inc., et al., B-186854, June 29, 1977, 77-1 CPD 461. While the question of "bid responsiveness" properly does not arise in a negotiated procurement, see, e.g., Home and Family Services, Inc., B-182290, December 20, 1974, 74-2 CPD 366, the submission of an unacceptable sample

may result in rejection of a proposal as technically unacceptable. See D. H. Moody & Company, Inc., 55 Comp. Gen. 648 (1976), 76-1 CPD 16.

The bid sample clause contained in the solicitation states in pertinent part:

"BID SAMPLES:

"(a) Bid samples * * * must be * * * from the production of the manufacturer whose product is to be supplied * * *. Samples will be evaluated to determine compliance with all characteristics listed for examination in the solicitation. * * *

"(b) Failure of samples to conform to all such characteristics will require rejection of the bid.- * * *

"(c) Products delivered under any resulting contract shall strictly comply with the approved sample as to the subjective characteristics listed for examination and shall conform to the specifications as to all other characteristics." (Emphasis added.)

The subjective characteristic listed for examination in the solicitation was "workmanship"; the objective characteristics were "dimensions" and "load ratchet drop test." With respect to "workmanship", the specifications stated only that:

"Workmanship shall be first class. * * *
The lid shall fit the case body closely but shall not bind when opened or closed."

Litton concedes that the piano hinge was not an explicitly listed evaluation characteristic for the samples. Nonetheless, it contends that even though the sample boxes submitted by American may have been of acceptable "workmanship", there was no reasonable basis for GSA to conclude that with the addition of the six inch piano hinge American's "production boxes would retain the requisite

qualities of acceptable workmanship." Thus it is Litton's position that the six inch hinge design requirement is inherent in the evaluation of "workmanship." Litton claims our recent case, Airway Industries, Inc., et al., 57 Comp. Gen. 686 (1978), 78-2 CPD 115, supports this proposition.

We disagree. Airway involved the procurement of molded plastic dispatch cases for GSA's Federal Supply Service. The applicable Federal specifications gave bidders the option of submitting bid samples with either a lined or an unlined interior. Unlined interiors were to be grained (textured). Among the subjective characteristics listed in the solicitation's bid sample clause for examination was interior "appearance"; for unlined interiors, appearance was to be evaluated for "neatness and smoothness of visible interior * * *." In addition, the applicable Federal Specification required that:

"Both 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." (Emphasis added.)

The unlined bid sample in question met the appearance requirement for "neatness and smoothness of visible interior"; however, it had no texture applied to the interior surfaces. We concluded that the Federal Specification, requiring a "uniform grain" after molding, bore a direct correlation to the specific appearance requirement that characteristic could not be demonstrated by an ungrained surface. Thus we stated:

"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."

Airway, therefore, stands for the proposition that to the extent a direct correlation between an aspect of the specification and the characteristics listed for bid sample examination can be found, the bid sample must also comply with that aspect of the specification, even though it is not separately listed as a specific

characteristic to be examined. Generally, however, so long as the bid samples submitted for examination comply with the stated purpose for which they were required, there is no requirement that the samples otherwise comply with the specifications, nor is the bidder, by submission of such non-compliant samples, relieved from furnishing items fully in accord with those specifications. See D. N. Owens Company, 57 Comp. Gen. 231 (1978), 78-1 CPD 66.

Here, we find Airway inapposite because we believe there is a distinct difference between "appearance" and "workmanship." "Workmanship" is defined in Webster's Third New International Dictionary (1971) as "the quality imparted to a thing in the process of making." Likewise, "quality" is the "degree of conformance to a standard", or "the degree or grade of excellence." The American Heritage Dictionary (1976). "Workmanship" is thus a general characteristic of an item attributable to the care by which the maker took to build that item, i.e., the manner in which the maker of the item conformed to a "quality" standard as opposed to a specific design. Appearance, however, is not so readily measured in terms of a standard, but is more dependent upon whatever precise factors make up the overall appearance of an item. Thus, while in Airway appearance could not be measured without regard to the presence of graining, we believe the "degree of conformance" to the workmanship requirement that the "lid of the box fit the case body closely" without "binding when opened or closed," could be reasonably based on a sample which did not conform to the design specifications in every respect, and that under the terms of the bid sample clause, supra, American would be obligated to deliver a product conforming to the standard of workmanship accepted in the approved bid sample, but otherwise conforming to the specification requirement for a six inch piano hinge. See 49 Comp. Gen. 311 (1969).

Consequently, we believe GSA properly could find American's sample to be acceptable.

Since bid samples may not always comply with design specifications, however, it is important that the procurement agencies have an adequate procedure by which the

capability to perform the contract of a bidder/offeror whose sample is not in full compliance with the specification can reasonably be determined prior to any contract award. GSPR 5A-2.202-4(c)(g) provides for such a procedure, as follows:

"If the bid sample has been found to conform to all of the characteristics listed in the solicitation, but found deficient with respect to one or more of the unlisted characteristics, a plant facilities report [PFR] shall be requested * * * [with] a request that special attention be given to the prospective contractor's ability (notwithstanding the deficiencies noted with respect to the characteristics not listed in the solicitation which were evaluated) to produce supplies fully conforming to the applicable specifications. * * * The plant facilities report shall include a specific statement regarding the prospective contractor's ability or availability to correct each noted deficiency * * * as well as an overall appraisal of his capability."

The determination of an offeror's ability to perform involves the responsibility of the offeror, 52 Comp. Gen. 389 (1972), and the PFR is no more than an aid in the overall determination of responsibility. Consequently, we find to be without merit the protester's assertion that the PFR was used to make American's offer "responsive."

We agree with Litton's final contentions to the extent that the PFR was not conducted until after the award of the contract to American, because GSA's actions in this regard overlook the fact that the purpose of a PFR is to assist the contracting officer in his preaward determination of responsibility. Notwithstanding this procedural deficiency, however, we find no basis to disturb the award, as the best interest of the Government is not necessarily well served by recommending corrective action which might entail contract termination where the deficiency does not result in prejudice to other

bidders/offerors. See Cohu, Inc., 57 Comp. Gen. 759 (1978), 78-2 CPD 175. Prejudice is an essential element of a viable protest, and this Office will not disturb an award merely because some technical deficiency in the procurement process may have occurred. Cf. Honeywell Information Systems, Inc., B-191212, July 14, 1978, 78-2 CPD 39. In this instance, although the PFR was erroneously performed after award, the PFR was positive and there is no reason to believe it would not have been positive if performed prior to award. Thus we cannot conclude that Litton was prejudiced by the procedural error in this case.

Finally, we point out that regardless of this deficiency, Federal Procurement Regulations 1-1.1204 (1964 ed. amend. 95) provides that the signing of a contract may be deemed to be an affirmative determination by the contracting officer that the prospective contractor is responsible with respect to that contract. Thus we believe the award is not subject to question because of the failure to obtain the necessary PFR in this instance prior to award. Cf. Hendricks Printing Company--Reconsideration, B-186590, November 17, 1976, 76-2 CPD 426 (where the contracting officer did not make an affirmative determination of responsibility prior to award).

The protest is denied.


Deputy Comptroller General
of the United States