

DECISION



11247
Proc I
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-194565

DATE: August 27, 1979

MATTER OF: Patton Electric Company, Inc.

DIGEST:

DLG 02639

1. GAO cannot take exception to GSA's rejection of protester's bid samples--and attendant rejection of low bid for certain items--since: (a) record does not show rejection of samples was arbitrary or that samples were evaluated in other than impartial and careful manner; and (b) bid rejection on test failure of samples was in accord with IFB provision which stipulated that failure of samples to meet all required characteristics would require rejection of the bid.
2. To extent protester contends rejection of bid samples was based on "sabotage" of, or "deliberate tampering" with, samples--especially via "tool marks" on samples--contentions relate to possibility of criminal conduct which is for attention of law enforcement authorities and not GAO. In any event, apart from GSA denial of responsibility for any "tool marks" or "blemishes" on sample and bidder's failure to show its lack of possible responsibility for presence of "tool marks," there is substantial doubt as to whether "tool marks" affected test failure.
3. GAO cannot question GSA technical positions that its inspectors did not cause alleged "distortion" in bid sample through handling in test procedure or that test probe used on sample was exactly as specified even though GSA inspector erroneously suggested test probe was subject to dimensional "tolerance."
4. Protester has not met burden of proving its version of disputed facts concerning alleged statement of GSA inspector about importance of "rough edges" found on protester's bid sample. Consequently, GAO must accept GSA view that its inspectors did not consider sample's "rough edges" to be minor.

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[Protest Involving Rejection of Low Bid]

5. (It is GAO's policy not to refer bid samples to independent laboratory for further testing merely because protester--whose samples were rejected--has requested testing.) Further, even though other samples taken from identical production run were certified by independent laboratory, certification is not decisive on question of acceptability of samples nor does fact that similar samples may have been erroneously accepted under prior procurements bar Government from rejecting current nonconforming samples.
6. Protester's arguments concerning: (a) alleged arbitrary rejection of samples in pre-1979 procurements; (b) GSA's failure to change certain Federal electric fan specifications; and (c) successful bidder's alleged failure to submit "proof of U.L. listing prior to bid opening," are untimely filed under GAO's Bid Protest Procedures (4 C.F.R. part 20 (1979)) and will not be considered.

(Patton Electric Company, Inc. (Patton), has protested the rejection of its low bid for certain items of electric fans under General Services Administration (GSA) invitation for bids (IFB) 9PR-W-604-79/KH. Patton's low bid for items covered by National Stock Number (NSN) 4140-00-833-5068, and NSN-9319 was rejected after GSA's Research and Development Laboratory found that bid samples for these items "did not pass inspection." (Patton also protests the rejection of its bid sample for NSN-9912 on which it was not the apparent low bidder. Since the company was not the low bidder on this item and because award has in fact been made to a bidder which submitted a bid lower than Patton's bid, the rejection of Patton's sample here does not affect the legality of the award for NSN-9912; thus, we consider it unnecessary to consider Patton's arguments concerning its sample under this item.)

We cannot question the rejection of Patton's low bid for the reasons set forth below.

The IFB's requirements for bid samples were as follows:

"Bid samples * * * must be (1) furnished as a part of the bid, (2) from the production of the manufacturer whose product is to be supplied, and (3) received before the time set for opening bids. Samples will be evaluated to determine compliance with all characteristics listed for examination in the Invitation. * * *

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

"One bid sample is required for each of the following items in this solicitation.

"* * * NSN 4140-00-833-5068 * * * NSN 4140-00-851-9319 * * *.

"Samples will be evaluated to determine compliance with all characteristics listed below.

"WF-97G [NSN-5068]

Subjective Requirement as cited in Paragraph 3.8
Workmanship

Objective Requirement as cited in Paragraph 3.4.3
Pedestal [and] Paragraph 3.4.6 Guard

"W-F-101J [NSN-9319]

Subjective Requirement as cited in Paragraph 3.8
Workmanship

Objective Requirement as cited in Paragraph 3.4.4.1
Guard Type I and II."

GSA states that Patton's samples did not pass inspection under the above requirements for the following reasons:

Bid Sample for NSN-5068, Pedestal Fan

"Failed paragraph 3.4.6 [of Federal Specification WF-97 G] that a sphere 1/2 inch in diameter shall not be able to penetrate the guard. A 1/2 inch sphere penetrated the guard."

Bid Sample for NSN-9319, Oscillating Fan

"Failed paragraph 3.8 Workmanship [of Federal Specification W-F-101J, which provided, among other things, that 'all * * * rough * * * edges shall be removed'] : rough edges on 2 position guides in the guard." (GSA has also cited "drop test" failure as another reason for failing Patton's sample under NSN-9319. We see no need to discuss this additional reason for GSA's rejection of the sample here in that the workmanship failure noted under paragraph 3.8 was reason enough, as noted below, to fail the sample; nevertheless, by letter of today to the Administrator, GSA, we offer our view that the "drop test" was not specifically incorporated by reference in the IFB and, therefore, was not properly applicable to the bid samples under this item.)

Because of these inspection results and since the items described under NSN-5068 were urgently needed, GSA awarded the items to the second low bidder, Frigid, Inc. (Frigid), whose sample passed inspection. As to NSN-9319, GSA found that none of the samples submitted by the competing bidders passed inspection; consequently, GSA has stated that it intends to reject all bids received and rebid the requirement.

Patton's Protest

The grounds of Patton's protest are summarized under the following paragraphs.

(1) The pedestal fan (NSN-5068) sample rejected by GSA should not have failed "barring sabotage." Specifically, GSA inspectors admitted that Patton's pedestal fan showed evidence of distortion in the guard and tool marks in the area where the 1/2-inch probe

penetrated. Further, a GSA inspector has suggested that the 1/2-inch probe should be subject to a tolerance of 1/64th of an inch yet Patton's fan guard was not given a similar tolerance. Patton also insists that the procedures used by the GSA inspectors in preparing the pedestal fan for testing could have distorted the guard causing it to fail the 1/2-inch probe test.

(2) The oscillating fan NSN-9319 should not have been failed for rough edges absent "undue nit-picking." Patton understands, moreover, that some GSA inspectors questioned whether Patton's fan should be failed for this alleged defect and later characterized the failure as minor.

(3) Actions by certain GSA employees and representatives of Frigid emanating from earlier procurements suggest the possibility of criminal action. Consequently, Patton requests that its fans be impartially inspected by another Government agency--especially since an independent laboratory has certified Patton's fans--and that a random sample of Frigid's fans be further tested for compliance with the specifications.

(4) Patton's rejection here is inconsistent with the acceptance of its fans on some prior Government procurements. As to prior procurements in which its samples were rejected, GSA arbitrarily rejected those samples thus showing a pattern of inconsistency.

(5) Patton's request to GSA to revise or modify existing Federal Specifications so as to prevent arbitrary rejection of bid samples was improperly denied by GSA in 1978.

(6) Frigid failed to submit "proof of U.L. listing prior to bid opening" even though the IFB required this proof. Further, GSA improperly waived Patton deficiencies under certain 1978 GSA procurements.

GSA Response

(keyed to the above-numbered paragraphs)

(1) and (2) At no time during the bid sample evaluation were Patton's fans tampered with or sabotaged. The samples were tested as received from the bidders; moreover, GSA has been assured by its Quality Assurance and Reliability Office that correct inspection procedures were followed in this case and that the results (noted above) are in accordance with the facts and required rejection of Patton's bid. Furthermore, it should be noted that the evaluating officials did not know which bidders had submitted the lowest bids at the time samples were evaluated.

As to the specifics of Patton's protest GSA submits the following answers:

(a) Any distortion of the fan guard on Patton's pedestal fan sample would appear to have been caused in the manufacturing process.

(b) To the extent "tool marks" may be present on Patton's pedestal fan sample, GSA denies responsibility for the marks. In fact the so-called tool marks appear to be "raised blemishes" in the metal which have been smoothed over in the manufacturing process.

(c) The remark by a GSA employee that the 1/2-inch test probe (used in the pedestal fan test) should be subject to a tolerance of 1/64th of an inch was an erroneous statement on the part of the inspector. The test probe actually measures 1/2 inch exactly as witnessed recently by Patton.

(d) GSA denies that the type of handling of the pedestal fan during the test procedure could have distorted the guard.

(e) As to Patton's oscillating fan (-9319), GSA denies that some of its inspectors questioned whether Patton's fan should be failed for roughness or that these inspectors later characterized the defect as minor and subjective.

(3) GSA insists that correct procedures were followed here, as noted above under its replies (1) and (2).

(4) The mere fact that prior Patton fans passed sample testing is not decisive on the question of the acceptability of samples submitted under this IFB.

(5) No reply.

(6) No reply.

Analysis

(keyed to the above-numbered paragraphs)

The general approach our Office has followed in reviewing protests against the rejection of bid samples is exemplified by the following quotation taken from our decision in B-176210, February 2, 1973:

"As procurement officials are better qualified than our Office to review and evaluate the sufficiency of offered products to determine whether they meet the requirements that are needed, our Office will not attempt to substitute its judgment for that of the contracting agency unless the record establishes that such judgment was without basis in fact. The only argument you present to impeach those test results utilized by GSA to reject your bid sample is that tests performed for you by an independent laboratory relative to last year's contract reflect different results than those presently arrived at by GSA. We do not believe that this is a sufficient basis to overcome the judgment of FSS. Since the IFB specifically stated that the failure of the samples to conform to the characteristics to be tested would require rejection of the bid, we see nothing arbitrary or unreasonable in the contracting officer's reliance on the reported test results to reject your bid, and we therefore find no basis for acceding to your request that the Maximillian samples be tested by independent sources. Finally, in the absence of more than your unsubstantiated allegation of prejudice against Maximillian by GSA, we must conclude that no prejudice has been shown."

Thus, the primary question is whether the record before us establishes that GSA's rejection of Patton's samples was arbitrary. With this general principle, we will turn to an examination of the individual grounds of protest.

(1) To the extent Patton is alleging that its pedestal fan was deliberately tampered with the company is alleging the possibility of criminal conduct which is for the attention of appropriate law enforcement authorities and not our Office. Ling Electronics, Inc., B-194590, July 20, 1979.

As noted above, GSA denies responsibility for any "tool marks" (which apparently constitute the main point of Patton's "sabotage" allegation) that may appear on Patton's pedestal fan sample. Moreover, Patton has not established that it was not responsible for the "marks" either in its manufacturing process or in its delivery of the fan to GSA, other than its unilateral declarations to the contrary. Further, it is our understanding that GSA reports evidence of similar "marks" or "blemishes" on other parts of Patton's fan guard which successfully resisted penetration of the 1/2-inch probe so that there is substantial doubt as to whether the "marks" in question on the failed area of Patton's fan guard affected the penetration of the probe.

We offer the following specific comments on the remaining subissues raised under this ground of protest.

(a) We cannot question GSA's technical judgments that any distortion in Patton's fan guard would appear to have resulted from the manufacturing process and that the inspectors handling of the fan did not distort Patton's fan guard.

(b) We cannot question GSA's positions that the statement of one of its employees concerning tolerance in the size of the test probe was in error or that the test probe measured exactly 1/2 inch notwithstanding this erroneous statement.

(2) Bid samples may properly be rejected for defective "workmanship" so long as the term "workmanship" is explained in the bidding documents, as was the case here through the incorporation of paragraph 3.8 of Federal Specification W-F-101J which provides: "* * * all burrs, rough and sharp edges shall be removed. * * *" As we stated in R&O Industries, Inc., B-183688, December 9, 1975, 75-2 CPD 377:

"We believe that samples could be rejected for poor 'workmanship' since that term was adequately defined by the IFB and that GSA's determination that the bid sample evidenced poor workmanship was reasonable."

It is clear, moreover, that even though "workmanship" was explained in the applicable Federal Specification, GSA's technical judgments as to acceptable workmanship would still be of a subjective character. Indeed, the IFB expressly characterized the "workmanship" requirement as "subjective."

Although Patton claims that some GSA inspectors characterized the finding of "rough edges" on this fan as minor, GSA officially denies this claim, thus generating a factual dispute. Patton has not, however, met the burden of proving its version of the disputed facts by introducing probative evidence--other than its bare statement of the events in question. See Micro Labs Inc.; Bowman Enterprises, Inc., B-193781, June 18, 1979, 79-1 CPD 430. Consequently, we must accept GSA's view that its inspectors did not consider the rough edges on Patton's fan to be minor.

Given the subjective character of the GSA's "rough edges" finding and the absence of any evidence in the record showing that the edges found in the Patton fan were other than demonstratively rough--apart from Patton's mere allegation to the contrary--we cannot question the rejection of Patton's NSN-9319 fan for this reason alone.

(3) As noted above, any allegations regarding possible criminal activity are for review by appropriate law enforcement authorities and not our Office.

As to Patton's request that its sample be referred for testing to an independent laboratory, it is GAO's policy not to do so. See B-176262, January 23, 1973. Similarly, we cannot compel GSA to retest samples of Frigid's fans as Patton requests; nor do we see the necessity for GSA to do so even in the abstract since Patton has not shown where GSA erred in testing Frigid's fans.

The mere fact that Patton's fans may have been certified, at Patton's expense, by an independent laboratory is not decisive on the question of the acceptability of its samples. This is so especially since the samples which were tested by GSA were not the exact ones tested by the independent laboratory but rather were fans "identical" to the ones tested by GSA, that is, apparently taken from the same manufacturing run. We cannot agree with the principle that manufacturing processes are so exact that fans from the same manufacturing run are "identical" in every detail. In any event, the mere fact that technical evaluators, hired by a prospective contractor, have reached differing conclusions from Government evaluators does not show that the Government samples evaluation was erroneous. See R&O Industries, Inc., supra. It is not uncommon that technical evaluators disagree on technical conclusions, especially where subjective elements are present; nevertheless, GSA, rather than an independent laboratory, is the officially authorized agency for determining the technical acceptability of these samples and GAO cannot disregard this authority.

(4) Even though Patton may have furnished acceptable fans under prior procurements this fact does not determine the acceptability of fans submitted here, recognizing that manufacturing processes are not so exact that complete identity of manufactured goods may be assumed even if the items are otherwise of the same product line. See Airway Industries, Inc.; United States Luggage Corporation, 57 Comp. Gen. 686 (1978), 78-2

CPD 115. Even the erroneous acceptance of nonconforming items on prior contracts 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); to hold otherwise would require the Government to be forever bound by prior erroneous decisions.

As to Patton's arguments that GSA arbitrarily rejected some of its samples on other pre-1979 procurements, we find these arguments are clearly untimely raised under section 20.2(b)(2) of GAO's Bid Protest Procedures, 4 C.F.R. part 20 (1979), since they were filed, at best, months after the bases of protests were known or should have been known.

(5) Patton's protest against GSA's failure to change some of the pertinent Federal fan specifications was a basis of protest which was required to have been filed with our Office within 10 working days from GSA's "adverse action" on Patton's protest--assuming, for the sake of discussion, that Patton's 1978 correspondence with GSA on the specifications at issue should be considered a protest. See 4 C.F.R. § 20.2(a) (1979). The opening of bids here by GSA in January 1979 without correcting the specifications was "adverse action" on Patton's specification "protest." See East Bay Auto Supply, Inc; Sam's Auto Supply, 53 Comp. Gen. 771 (1974), 74-1 CPD 193. Under this view Patton's April 1979 specification protest to GAO is clearly untimely filed and will not be considered.

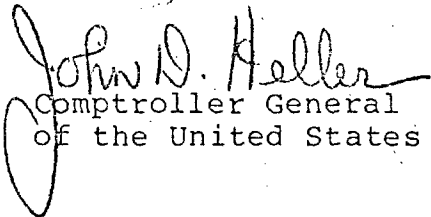
(6) Patton's June 25 complaint about Frigid's failure to submit "proof of U.L. listing prior to bid opening" relates to an alleged defect which should have been apparent, at the latest, in Frigid's bid. Since submitted bids were available for public inspection under Federal Procurement Regulation (FPR) § 1-2.402(c) (FPR cir. 1, June 1964) (which provides: "Examination of bids by interested persons shall be permitted if it does not unduly interfere with the conduct of Government business * * *"), the alleged deficiency should have been made the subject of a protest filed within 10 working days after GSA informed interested parties in early May 1979

that it was making an award to Frigid notwithstanding the pendency of Patton's protest. See Beta Systems, Inc.; Brown-Minneapolis MTM Tank and Fabricating Company, B-184413, February 18, 1976, 76-1 CPD 109. Thus, this ground of protest--first raised in Patton's June 25 letter--is untimely filed. Finally, Patton's other complaints about alleged waivers granted to Frigid under 1978 GSA procurements must also be considered untimely filed and will not be considered.

Conclusion

We cannot take exception to GSA's rejection of Patton's samples here notwithstanding that Patton was the lowest bidder for some of the items. The present record does not show that this rejection was arbitrary or that these samples were evaluated in other than an impartial and careful manner. Further, the rejection was in accord with the IFB which provides, as noted above, that the failure to meet all required bid sample characteristics would require rejection of the bid.

Protest denied in part and dismissed in part.


For The Comptroller General
of the United States