

18626



DECISION

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

FILE: B-200391.2, et al. DATE: June 24, 1981

MATTER OF: Alan Scott Industries; American
Medical Instrument Corp.

DIGEST:

1. GAO will not question agency's determination that existing Federal specification meets actual needs where there is no showing that determination lacks reasonable basis.
2. Bid sample requirement requiring submission of sample "as part of the bid" may not be interpreted so technically as to exclude low bidder from consideration for award because bidder submitted samples prior to bid opening to contracting activity's technical personnel.

Alan Scott Industries (ASI) protests issuance by the Defense Logistics Agency (DLA), Defense Personnel Support Center, of numerous solicitations (docketed under B-200391.2, B-201832, B-201958, B-202639, B-202914, B-203003 and B-203004).

ASI contends that certain phrases in the specifications for surgical instruments are either so broad, as to be open to arbitrary and subjective interpretation, or are internally inconsistent. ASI asserts that DLA has in the past sabotaged ASI-furnished samples, that DLA has construed the above-mentioned specifications in an arbitrary manner detrimental to ASI, and that DLA is conducting improper testing. ASI also requests that DLA furnish ASI with sealed intermediate packages of instruments procured under contract from other suppliers in order that ASI can have a standard against which to prove that the DLA rejected ASI instruments which are equal to or better than the DLA-accepted instruments of other suppliers. ASI alleges that the specifications are restrictive of competition since their arbitrary nature deters potential suppliers from entering the competition, which limits the Government's sources of supply and ultimately drives up the cost of medical instruments.

[Protest of Solicitation Specifications]

017403 **115642**

American Medical Instrument Corporation (AMICO) protests any award of invitation for bids (IFB) No. DLAl20-81-B-0860 (docketed under B-201832.2) to Surgical Instrument Company of America (SICOA) on the ground SICOA's bid is nonresponsive for failure to submit bid samples at the time and place specified in the solicitation. SICOA's bid samples were sent directly to DLA's testing laboratory, arriving the day before bid opening, and did not accompany the SICOA bid.

ASI'S PROTESTS

We first considered similar ASI arguments in Alan Scott Industries, B-199662, et al., January 27, 1981, 81-1 CPD 44, and found the arguments, against the use of terms such as "well rounded," "well cut and defined," and "properly formed" in the DLA specifications, an insufficient ground upon which to conclude that the DLA specifications lacked a reasonable basis. We also rejected ASI's allegations concerning the impropriety of copper sulfate testing on AISI Type 400 stainless steel instruments on the basis of our previous review of the same allegation. It was noted that DLA intended to furnish ASI with samples as they became available; however, we are unaware of any law or regulation which requires DLA to furnish ASI with samples, much less with the sealed samples that ASI is now requesting. Subsequently, ASI offered similar arguments in Alan Scott Industries, B-201743, et al., March 3, 1981, 81-1 CPD 159, which were rejected as being indistinguishable from its previous contentions. We further rejected ASI's contentions concerning alleged deficiencies in DLA's testing program as matters of contract administration which are not for our consideration. We believe that determination to be equally applicable to ASI's current allegations concerning sample sabotage and otherwise improper DLA testing procedures. In both of the above-cited cases, ASI sought reconsideration and in both cases the prior decisions were affirmed. Alan Scott Industries--reconsideration, B-199662, et al., March 10, 1981, 81-1 CPD 187; Alan Scott Industries--reconsideration, B-201743, et al., April 1, 1981, 81-1 CPD 251.

ASI now presents five arguments directed at specific phrases found in DLA's Medical Procurement Item Description No. 3 (MPID No. 3), dated December 12, 1980. DLA reports that only ASI has challenged MPID No. 3. According to DLA, the challenged phrases are descriptive of what are essentially tactile attributes of medical instruments and well understood in the surgical and dental industry. Besides MPID No. 3, there are three other specifications treating the same subject matter: MIL-F-36943; Federal Specification CGI-526b (October 11, 1965); and American National Standards Institute's (ANSI) American National Standard MD156.29-1976, General Specification for Hand Instruments. All four specifications are interrelated. MPID No. 3 references the ANSI specification while the MIL specification incorporates the Federal specification by reference. Finally, the ANSI specification is virtually identical to the Federal specification and both refer in their text to "the detailed specification" which has the effect of incorporating MPID No. 3 by reference.

DLA prefaces its response to the specific objections by noting that MPID No. 3 is necessarily more subjective than other specifications because of the nature of the manufacturing processes involved. Moreover, DLA reports that, in conjunction with ANSI, the Government is attempting to introduce as much objectivity as possible into the standard and is open to suggestions regarding any objective criteria which would help to quantify the essentially tactile attributes of the instruments; for example, consideration is now being given to including a drawing in the specification.

Turning to ASI's five specific objections, we will examine the challenged phrases, similar phrases in the related Federal specification, ASI's specific arguments and DLA's responses, bearing in mind that our Office does not question an agency's determination that an existing Federal specification meets its actual requirements unless the determination lacks a reasonable basis. Alan Scott Industries, B-199662, et al., January 27, 1981, 81-1 CPD 44.

I.

MPID No. 3 - "The forceps shall be symmetrical and well-balanced."

Federal Specification

"3.4 Style, design and dimensions. Instruments shall conform to style, design, and dimensions specified in the detail specification [MPID No. 3]. Tolerances indicated in drawings and figures are intended to delineate extreme dimensions, and are not intended to permit variations within a single instrument which will sacrifice proper uniformity, symmetry, balance, and first quality workmanship." (Emphasis supplied.)

ASI contends that it is impossible to evaluate whether the proffered instruments have the required attributes since symmetry and balance are not detailed on the drawing.

DLA reports that symmetry is meant to typically depict among other things: (1) that the instrument's jaws have the same shape, size, and width; (2) that the finger rings are in the same reference plane; (3) that the finger ring openings have the same width and height; (4) that the shanks have the same basic cross-section and taper; and (5) "[t]hat the relative distances of the working end members versus the distance to the proximal end from the fastening point achieves the necessary linear displacement for the functional, intended use of the item." DLA states that (5) above is what "actually produces, in effect, the 'well-balanced' criteria specified for if the parts are askew the balance would necessarily be affected." It is DLA's position that "the terms 'symmetry' and 'balance' are related. While these terms in themselves, without any quantifying criteria, are subjective, they become qualitative when used in the manufacture of surgical instruments considering the present state of the art."

II.

MPID No. 3 - "The box lock shall be accurately fitted and shall be without crevices, burrs, or sharp edges."

Federal Specification

"3.5.6 Locks. Forceps and similar instruments shall be of the screw type, box lock type, or lap joint type, as specified [MPID No. 3]. All types of locks shall be accurately fitted, without stiffness, and without crevices, burrs, or sharp edges at any place in their construction.

"3.6 Finish. Finish on all edges and surfaces shall be uniform, and free of burrs, sharp edges (except where required), crevices, grind marks, rough areas, cracks, and overlaps. In addition, finish shall be as hereinafter specified * * *.

"3.9 Workmanship. Workmanship shall be first class throughout. Instruments shall be free from defects which detract from their appearance or impair their serviceability, proper functioning, and intended use. Instruments shall be finished so as not to retain foreign matter, blood, pus, body fluids, etc. (i.e., absence of crevices, cracks, pits, etc.)." (Emphasis supplied.)

ASI believes that it is impossible to make a lock box "without crevices or sharp edges."

DLA admits that it is evaluating proposals to further clarify and define the term "crevice." However, as the term is now used and understood, a "crevice" is a gap or area in the box lock which can accumulate foreign matter during surgical procedures. DLA reports that the basic aim is to minimize the gap and that "in good machining practice of the female and male members of a

hemostatic forceps the clearance or gap is held to a minimum; this also includes excessive chamfering of a surface." It appears that there is no agreement in the industry regarding the minimum acceptable clearance. However, in many of DLA's drawings the minimum acceptable crevice is defined as a clearance no greater than 0.015 inch including chamfers. DLA does not agree with ASI's position that an elimination of "sharp edges" necessarily entails the creation of "crevices, or clearances, or gaps," since DLA believes that there are many ways to remove the sharp edges which occur in the machining process without creating crevices.

III.

MPID No. 3 - "The joint performance shall be smooth, of equal resistance, and non-binding in all positions when opening or closing."

ASI charges that the above constitutes a conflicting statement which cannot be judged.

DLA disagrees and reports that the majority of surgical instrument manufacturers believe that the above criteria are superior to any previous specification descriptive of the qualities sought in the operation of the lock function. The goal is to provide a background against which DLA can test "the opening and closing of the instrument for sticking, rubbing, and binding." DLA believes that "the hand force used in hand closure and opening should be smooth and with equal force. The surgeon should not have to exert great effort to utilize the instrument and at the same time should not have the instrument open or close in an uneven manner." These criteria supersede all previous specifications treating the operation of the lock function.

IV.

MPID No. 3 - "The instruments shall be uniform in quality and free from any defect that will affect life, serviceability, or appearance."

Federal Specification

See "3.9 Workmanship" above.

ASI protests this aspect of the specification on the ground that "there are no military standards or Federal specifications to detail the proper care and sterilization of stainless steel instruments to assure maximum life and serviceability."

DLA, however, reports that this is merely a general workmanship statement intended to alert the manufacturer to the fact that proper manufacturing techniques should be used in order that the instrument attain its intended utility and usability.

V.

DLA120-81-R-1043 - "Except as an alternate all eight edges of the box lock shall be bevelled."

ASI believes that the above is inconsistent with MPID No. 3's requirement that the box lock be without sharp edges. ASI further reports that the professional preference is for bevelled edges in the box lock areas of the instrument.

DLA disagrees, pointing out that the questioned phrase is merely providing an alternate method of fabrication, that it is not necessarily the professional preference, and that bevelling the edges could never result in a conflict with the requirement that the box lock be without sharp edges. In fact, some manufacturers are deliberately using "a pronounced level in the lock area to avoid sharp edges."

In the circumstances, we believe DLA has established the reasonableness of the protested specifications.

AMICO'S PROTEST

AMICO protests DLA's consideration of SICOA's bid on the ground that it is nonresponsive since SICOA sent the required bid samples to DLA's testing laboratory instead of to the address specified for receipt of bids. The IFB required bidders to furnish bid samples "as a part of the bid" and required their receipt prior to the time set for bid opening. The IFB stated that the samples would be tested and, if not destroyed by testing, would be returned at the bidder's

request and expense. The IFB also provided for examination by a professional panel for compliance with certain stated criteria.

DLA reports that SICOA's bid samples arrived at the laboratory the day before bid opening in a box which identified its contents as follows:

"Preaward Samples for Solicitation
#DLA120-81-B-0860 Bid Opening
January 22, 1981 2:PM

* * *

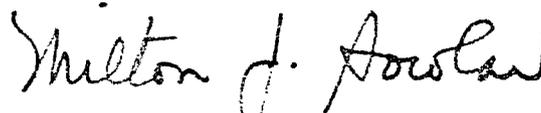
Please return samples upon completion of evaluation."

Although the IFB indicated that the bid sample had to "be submitted as part of the bid," DLA has cited our decision, Unique Packaging, Inc., 54 Comp. Gen. 157, 74-2 CPD 125, as dispositive of the issue presented. There, we made the following observation:

"Section 1-2.202-4 of the Federal Procurement Regulations (FPR) provides, relative to the requirement for bid samples, that the samples 'must be furnished as a part of the bid and must be received before the time set for opening bids.' This does not mean that a sample must be furnished with the invitation papers and that no other manner of timely submission will be permitted. To interpret that requirement so technically would be irrational. Rather, it means that the sample must be submitted to the activity in such a responsible manner as to identify it with the procurement in question, which must be done before bid opening. In the instant case, Design Pak delivered samples prior to bid opening to the person who would be responsible for examining the sample for the contracting officer. Consequently, we see no reason to consider Design Pak's bid to be non-responsive for its failure to submit a sample directly with its bid."

We agree with DLA.

Accordingly, the protests are denied.

A handwritten signature in cursive script that reads "Milton J. Fowler".

Acting Comptroller General
of the United States



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

18626
~~18627~~

B-200391.2, et al.

June 24, 1981

The Honorable Lawrence Coughlin
House of Representatives

Dear Mr. Coughlin:

We refer to your interest in the protests of Alan Scott Industries concerning solicitations for surgical instruments issued by the Defense Logistics Agency.

By decision of today, copy enclosed, we have denied the protests.

Sincerely yours,

Acting Comptroller General
of the United States

Enclosure