

DECISION

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

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FILE: B-214859

DATE: August 27, 1984

MATTER OF: ATD-American Co.

DIGEST:

Submission of a bid sample that did not exactly reflect all features of the item to be provided should not have resulted in rejection of the bid as nonresponsive where it is unreasonable to conclude that the bidder intended to qualify the bid, and the sample in fact established the acceptability of the offered item.

ATD-American Co. protests the rejection of its low bid as nonresponsive to invitation for bids (IFB) No. 8423, issued by the Architect of the Capitol for the procurement of huck towels for the United States Capitol and the House Office Buildings. A contract was awarded to the fourth low bidder, Calico Industries, Inc., after the bids of ATD and two other firms were rejected for failure to submit with their bids proper samples of the towels proposed to be supplied. ATD protests that the sample it submitted was adequate.

We sustain the protest.

The IFB provided, in section 1 of the specifications, that the huck towels must be 17 inches by 22 inches, white, fully bleached, without woven design or stripe, and conform to a cited Federal Specification, which required folded hemmed edges. Bidders had to "submit as a part of their bid, in the manner set forth hereinafter in Section 2 of the Specifications, a sample of the huck towel proposed to be furnished." (Emphasis in original.) Section 2 of the specifications, however, merely stated that towels must be packed 50 dozen to a box.

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ATD submitted two bid samples. One was 20-1/8 inches by 11-1/4 inches, with not all edges folded, and the other, offered as an alternate, was 16-5/8 inches by 14-1/4 inches, with two edges unhemmed and two overcast rather than folded. The agency rejected ATD's bid as nonresponsive because the samples were not of the precise size specified and were not fully hemmed.

ATD complains that the IFB sample provision did not state that a full-size, 17-inch by 22-inch sample was required. ATD asserts that because huck towels are cut from yard goods and hemmed to whatever size specified by the customer, it is industry custom not to manufacture one special sample at a time, but instead to submit a swatch of the material as a sample. ATD points out that it took no exception in its bid to the specifications, and that the samples it submitted showed all necessary characteristics such as color, appearance, and workmanship.

The responsiveness of a bid concerns whether a bidder has unequivocally offered to provide supplies or services in conformity with the material terms and conditions of the solicitation. See Jimmie Muscatello's Military and Civilian Tailors, B-211578, Sept. 29, 1983, 83-2 CPD ¶ 390. To insure a common basis for intelligent competition, it is important that the terms and conditions that define a bid's responsiveness be clearly set out in the invitation. Thus, where a bid sample is needed to assure the procurement of an acceptable product, the invitation should list those characteristics for which the sample will be examined, set bid opening as the latest time for submission of the sample, and caution firms that a bid will be rejected if the sample does not conform. See D.N. Owens Company, 57 Comp. Gen. 231 (1978), 78-1 CPD ¶ 66; Federal Procurement Regulations (FPR), 41 C.F.R. § 1-2.202-4 (1983).^{1/} The sample,

^{1/} While the FPR did not apply to this procurement, since it does not cover purchases by the Architect of the Capitol (FPR, 41 C.F.R. §§ 1-1.004, 1-1.203), the regulations nevertheless provide significant guidance on this issue. In fact, the Architect advises that as a result of this protest he intends to revise the bid sample provision consistent with the Federal Acquisition Regulation (FAR) on bid samples. See FAR, § 14.202-4, 48 Fed. Reg. 42,174 (1983) (to be codified at 48 C.F.R. § 14.202-4).

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however, is to be evaluated only for the characteristics set forth in the solicitation; a sample need not meet every specification requirement that the items to be furnished under the contract must meet. See 49 Comp. Gen. 311 (1969).

Here, the solicitation's bid sample provision does not state the characteristics the sample must meet. Nevertheless, we think that if it were clear from the samples ATD submitted that the firm intended to qualify the bid by taking exception to the towel specifications, the bid would have to be rejected, notwithstanding the deficiency in the bid sample provision. Where a bidder takes exception to an invitation's material terms, the firm is, in effect, offering the government an item on different terms than those on which bids were invited; the government's acceptance of such a bid would, as a legal matter, bind the bidder only to furnish the qualified item offered. Such a bid therefore must be rejected as nonresponsive. See FAR, § 14.202-4(g), 48 Fed. Reg. 42,174, which provides that even an unsolicited bid sample cannot be disregarded if it qualifies the bid.

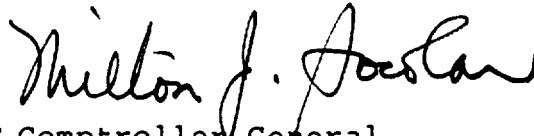
While it would have been prudent of ATD to submit, as a sample, the same end product it would furnish under the contract, we believe it would be unreasonable to view ATD's actual sample submission as an offer to furnish only half-finished, missized towels, and to suggest that acceptance of the bid based on those samples would legally obligate ATD to furnish no more than that. To the contrary, we think it obvious that ATD's samples were intended to establish the acceptability of the firm's material and workmanship, and not to qualify the bid in terms of towel size or finish. In this respect, we note that the Architect advises the sample was needed to assure that the product to be delivered would comply with, particularly, the required standards of workmanship, appearance, color, "hand," surface roughness or

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softness, and suitability for intended use. Certainly, with two edges on the first sample hemmed the agency could determine the adequacy of workmanship, appearance and surface softness with respect to the hemming. Indeed, the Architect does not contend that the bid samples ATD furnished at bid opening do not comply with all the features which were to be evaluated against the sample, or that ATD actually is incapable of supplying conforming towels.

Under these circumstances, we believe acceptance of ATD's bid clearly would have bound the firm to furnish huck towels meeting all necessary specifications, including those relating to size and finish. ATD thus improperly was denied the contract award. In view of the advanced state of contract performance, however, no remedial action with respect to the contract is practicable. Instead, we recommend that ATD be reimbursed its bid preparation costs. An unsuccessful bidder is entitled to reimbursement for those costs where the contracting agency acted in an arbitrary and capricious manner with respect to the claimant's bid, which we believe was the case here, and the bidder otherwise would have been awarded the contract. See Fisher-White-Rankin Contractors, Inc., B-213401, April 24, 1984, 84-1 CPD ¶ 471. ATD should submit to the Architect documentation to establish the amount to which it is entitled.

The protest is sustained.


Acting Comptroller General
of the United States