



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: ATD-American Company

File: B-231794

Date: October 18, 1988

DIGEST

1. Where low bidder's bid sample was determined noncompliant with listed sample evaluation characteristics and solicitation required rejection of bid for such nonconformity, the low bid was properly rejected as nonresponsive.

2. Conflicting test results from a government approved independent laboratory do not establish that agency's test results were incorrect absent a showing that agency's test was defective or improperly conducted, or that the results were erroneously reported.

DECISION

ATD-American Company protests the award of a contract for "Type 1" bed pads to Hosposable Products, Inc., under invitation for bids (IFB) No. M1-69-88, issued by the Veterans Administration (VA). The IFB contained three bid items. ATD was the low bidder for all three items. ATD was awarded a contract for items 1 and 2, but was not awarded a contract for item 3, "Type 1" bed pads, because ATD's bid samples for item 3 did not comply with the specifications required by the solicitation. ATD alleges that its bed pads were not fairly and conscientiously evaluated and that it should have been awarded the contract for item 3 because its sample meets all the specifications set forth in the solicitation.

We deny the protest in part and dismiss it in part.

The solicitation stated that bid samples were to be furnished as part of the bid and that the samples would be tested to determine compliance with all the characteristics listed for evaluation in the solicitation. Noncompliance with the listed sample evaluation characteristic required rejection of the bid. The salient characteristics listed

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for evaluation for the "Type 1" bed pad are: (1) that bid item 3 pads must be "flame retardant" (tested in accordance with DOC Standard FF-4-72-Mattress and Cigarette test); (2) that they must be "capable of absorbing 200 ml. of water when tested with the vertical test; and (3) that they be sealed on four edges. The Service and Reclamation Division at the Supply Depot of the VA tested the protester's bed pads and determined that they were noncompliant for all three requirements. After the filing of this protest, the VA performed a second test in which it again found ATD's bed pads not in compliance with the flammability and absorbency requirements.

With respect to the evaluation of bid samples, since procurement officers have greater expertise than our Office in evaluating the sufficiency of offered products and determining whether they meet the requisite characteristics, we will not substitute our judgment for that of the contracting agency unless the record establishes that such judgment was without a basis in fact, or that the samples were not evaluated in accordance with the requirements of the purchase description. Airways Industries Inc., et al., 57 Comp. Gen. 686, 694 (1978), 78-2 CPD ¶ 115; Cathey Enterprises, Inc., B-194334, June 13, 1979, 79-1 CPD ¶ 418.


The protester contends that the agency did not properly evaluate its samples and has submitted test results concerning the flammability and absorbency of its bed pads prepared by two independent government approved laboratories. These test results show that the bed pads supplied to these testing laboratories by ATD did comply with the IFB purchase description requirements. However, conflicting test results do not establish that agency test results are incorrect, absent a showing that the agency's test was defective or improperly conducted or that the results were erroneously reported. Elwyn Institutes, B-211000, Aug. 2, 1983, 83-2 CPD ¶ 158; Cathey Enterprises, Inc., B-194334, supra. While the particular sample pads which ATD chose to submit to the independent testing laboratories may have passed the requisite tests, this does not establish that the samples which were submitted to the agency also would have passed.

We have examined the VA test results and they indicate that ATD's bed pads were subjected to the appropriate tests to establish compliance with the IFB purchase description, and that the pads failed both the flammability and absorbency test. The protester asserts that the tests may have been improperly conducted because the bid required submission of only six sample bed pads to test for both flammability and

absorbency. ATD contends that the applicable test requirements necessitate the testing of more than six sample pads in order to obtain proper and accurate test results. However, the solicitation called for the submission of only six pads as test samples, and ATD's contention that this constitutes an insufficient test sample constitutes a protest against an alleged apparent solicitation impropriety which must be filed prior to the date of bid opening. 4 C.F.R. § 21.2(a)(1) (1988); Rezcorp, B-230260, June 14, 1988, 88-1 CPD ¶ 569; Elwyn Institutes, B-211000, supra. Thus, ATD's contention that the number of sample pads required under the IFB for testing purposes was insufficient for proper testing is untimely since ATD's protest was filed after bid opening, and is not for consideration on the merits.

Accordingly, we find that ATD's bid was properly rejected as nonresponsive because the VA reasonably determined that ATD's bid samples failed to meet the requirements of the IFB purchase description.

The protest is denied in part and dismissed in part.

 *James F. Hinchman*
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