



146604

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Welcon
File: B-247032.2
Date: May 8, 1992

Richard P. Welch for the protester,
Ash Luthra for LSL Industries, Inc., an interested party,
C. Dale Duvall, Department of Veterans Affairs, for the
agency,
Richard P. Burkard, Esq., and John Brosnan, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Agency properly rejected bid as nonresponsive where bid
samples failed to conform to characteristics listed in
solicitation, which warned bidders that submission of
nonconforming bid samples with their bids would result in
rejection.

DECISION

Welcon protests the Department of Veterans Affairs' (VA)
rejection of its bid and the award of a contract to LSL
Industries, Inc. under invitation for bids (IFB) No. M1-30-
92 for patient irrigation kits. The VA rejected Welcon's
bid as nonresponsive because it found the protester's bid
samples unacceptable. Welcon challenges VA's determination
that its samples were nonconforming.

We deny the protest.

The irrigation kits called for by the IFB were to contain
two types of irrigation syringes--a bulb and a plunger
type--as well as a plastic tray, a plastic solution
container, and a waterproof drape. The IFB required bidders

In its initial protest, Welcon argued that the agency
should not have considered the awardee's allegedly late bid
and that the awardee was ineligible for award because that
firm was not a small business. The agency answered these
arguments in its report. Welcon did not respond to the
agency's rebuttal in its comments. Therefore, we deem these
issues to be abandoned, and we will not address them.
Vanguard Research, Inc., B-242633; B-242633.2, May 30, 1991,
91-1 CPD ¶ 517.

(to furnish) bid samples with their bids so that the agency could test or evaluate the samples to determine compliance with the characteristics listed for examination in the solicitation. It stated further that failure of these samples to conform to the required characteristics would require rejection of the bid.

The IFB provided, in this regard, that samples will be evaluated according to the commercial item description (CID) attached to the IFB. The CID set forth salient characteristics, including the following:²

((1) The catheter tip opening shall be a minimum of 3/16 inch (0.47 cm) and designed to accommodate standard size stomach tubes, feeding tubes, and urethral catheters.

((2) The base area of the tray with respect to the total outside surface area shall not be less than 22 percent.

((3) The syringe shall . . . be provided with a protective tip cover.

((4) The irrigation kit shall be free from defects which detract from its appearance or impair its serviceability.

Five bidders responded to the solicitation. The agency found that Welcon's bid samples were unacceptable for both types of syringes. With respect to the bulb type, the VA found that the opening of the Welcon syringe catheter tip was 11/64 inch, slightly less than the 3/16 inch minimum required. The agency also found that Welcon's samples did not meet the requirement that the base area of the tray shall not be less than 22 percent of the total outside surface area. Concerning the plunger type of syringe, the VA found that the opening of the catheter tip was 5/32 inch, again, slightly less than 3/16 inch requirement and that the syringe's protective tip cover fell off easily. The agency determined that only LSL submitted acceptable bid samples.

Because several of the bidders submitted nonconforming samples which were close to compliance with the minimum requirements, the contracting officer requested confirmation from the agency's technical personnel of the need for full compliance with the CID specifications. They responded that full compliance was necessary in order to ensure the safety of VA patients. The samples were then retested and, for the

²The CID for both styles of catheter tip irrigation syringes to be acquired under the IFB contained these requirements.

same reasons as set forth above, Welcon's bid samples were found to be unacceptable.

Welcon challenges VA's determination by questioning the validity of the test results. The protester asserts that by its measurement, the internal diameter of the opening for its syringes is 3/16 inch. The protester also contends that the syringes it offered here have been tested and found to be acceptable by VA in past procurements.

The protester's allegation that its samples were misevaluated constitutes a challenge to the agency's technical evaluation. Our Office will review an allegedly improper technical evaluation of samples to determine whether it was fair and reasonable and consistent with the solicitation evaluation criteria. PEC, Inc., B-243195, July, 15, 1991, 91-2 OPD ¶ 24.

Here, the agency states that it used calibrated plug gauges to test Welcon's samples for compliance with the catheter tip opening requirement. The agency states that the testing process "is started by selecting the 0.187 inch and the 0.188 inch plug gauges and inserting them into the opening." The agency points out that 3/16 inch equals 0.1875 inch and that the 0.188 inch plug "should fit very snugly" while the 0.187 plug "should be somewhat looser." When it tested Welcon's samples for compliance with this specification, the agency found that neither plug gauge would fit.

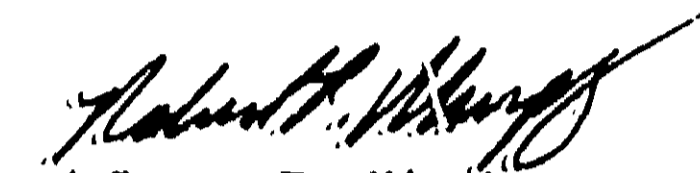
The protester concedes that these gauges are accurate but asserts that the agency may have erred in using the gauges. While Welcon states that by its measurement its syringes comply with the 3/16 inch requirement, it has not stated the method it used to arrive at its conclusion. Given the testing method employed by the agency, the second round of tests it conducted which verified those results, and the protester's failure to refute those findings, we find that VA reasonably concluded that Welcon's samples did not comply with the IEB requirement that the catheter tip opening be a minimum of 3/16 inch. The agency therefore properly rejected Welcon's bid on this basis. The protester's mere disagreement with the agency's conclusions does not render the VA's evaluation of its samples unreasonable or unfair.

Welcon also appears to argue that the samples should not have been tested for the internal opening diameter. Since the IEB clearly stated that bid samples would be evaluated to determine compliance with the characteristics listed in the CID and the internal diameter was one of those listed characteristics, if Welcon objected to testing for this dimension it should have protested prior bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1992).

With respect to the protester's argument that its syringes have been found to be acceptable under this CID in the past, the erroneous acceptance of nonconforming items on prior contracts does not bind the procuring agency to accept nonconforming items under a subsequent contract. Ashland Scissors, Inc., B-240930.2, Jan. 30, 1991, 91-1 CPD ¶ 86. To hold otherwise would require the government to be forever bound by prior erroneous decisions.

In view of the foregoing, we need not decide whether Welcon's bid samples also failed to conform to the other characteristics noted by the agency.

The protest is denied.


for James E. Hinchman
General Counsel