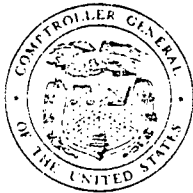


DECISION



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

40380

FILE: B-178728
B-178729

DATE: January 25, 1974

MATTER OF: Boston Pneumatics, Inc.; Penn Electric Motor
Company, Inc.

DIGEST: Protestant's objections that Government specifications are worthless and unduly restrictive and also that QPL should not be employed are denied since drafting of specifications and determination of whether product offered conforms to specifications are matters primarily within jurisdiction of procuring activity and GAO will accept judgment of procuring agency in that regard when it is not shown to be clearly erroneous, and use of QPL is valid method of procurement when needs of agency require it. See decisions cited.

Boston Pneumatics, Inc. (Boston), protested to our Office any award under solicitations Nos. FPNTP-B5-57912, -B3-61537, -B5-58043, -B6-61293, and -B5-59943 issued by the General Services Administration (GSA).

The protests against solicitation Nos. -B5-57912, -B3-61537, -B5-58043 and -B5-59943 all involve essentially the same argument and therefore will be treated together for purposes of this decision.

All of the above-mentioned solicitations requested bids for the furnishing of various quantities of electric impact wrenches in accordance with Federal Specification W-W-650C dated June 22, 1970.

The basis of the protest is that the above-mentioned specification requires improper, worthless, restrictive and arbitrary requirements and tests as a preproduction sample test.

Paragraph 3.4.4 of Federal Specification W-W-650C reads, in part, as follows:

"3.4.4 Conformance to standards of Underwriters, Inc. The contractor shall submit to the contracting agency proof that the basic wrench he proposes to supply under this specification conforms to the requirements of UL45. The label, or listing with reexamination of the UL may be accepted as evidence that the wrench conforms to this requirement. In lieu of the label, or listing with reexamination, the contractor may submit independent proof, satisfactory to the contracting agency, that

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"the wrench conforms to the applicable requirements of the published standards including methods of tests of the UL noted above. Compliance with requirements of UL regarding fire and casualty hazards does not absolve the contractor from complete compliance with the requirements of this specification in order to secure the acceptance of his wrench. In event of difference between any of the requirements of this specification and those of UL, the requirements of this specification shall govern."

In addition to the above, the schedule of the solicitation required that electromagnetic interference be suppressed in accordance with Military Standard MIL-STD-1337B dated April 8, 1971. Boston contends that to meet the requirements of MIL-STD-1337B, the wrench has to be altered in such a manner that it no longer conforms to UL45, thereby exposing workmen to the hazards of electrical shock.

A review of the specification shows that if the basic tool will not meet the electromagnetic interference suppression, a suppression circuit is added which remains a part of the tool throughout the test with the exception of the tests contained in paragraph 4.5.2 of the specification. The suppression system is removed for this test as the voltage employed during the test would short out the capacitors used in the system. Therefore, the tool as finally delivered to GSA is not in accordance with UL45. This is essentially the basis of the protest; that while the specifications require approval under UL45, the tool delivered will not meet this requirement.

An examination of the specification shows that UL45 approval is not required of the final tool. Paragraph 3.4.4 of the specifications, quoted previously, states that the "basic" wrench meets UL standards, not the final suppressed wrench.

The report from GSA regarding the protest contained the following explanation of the UL procedure:

"We do not warrant, nor would we permit (if made aware) the unauthorized use of a UL label even though the use and policing of UL labels is a UL function. We have attempted to prove the validity of citing conformance to UL 45 even though a suppressed tool cannot, at present, bear the UL label. We feel that testing to UL 45 serves a very definite purpose. The use of UL testing in the specification is thus not false and restrictive. The absence of a UL label may be misleading to one

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"not familiar with UL 45 and MIL-STD-1337. This is particularly true since the formation of OSHA. The UL label is recognized by OSHA inspectors.

"The requirement for conformance to UL 45 prior to incorporation, if required, of a suppression system, assures us that in all other aspects, the tools are in accordance with the recognized standard of the portable electric tool industry.

"To our knowledge, UL listing of a tool does not certify that tool to be shockproof or nonhazardous. The listing signifies that the particular tool examined and tested by UL (at the request of the manufacturer and after submission of the tool by the manufacturer) has met the minimum requirements of UL 45 and has thus 'earned' the right to bear the UL label. As we stated earlier, a suppressed tool is perfectly safe when used with proper grounding. A tool operator is no more apt to be shocked to death with a suppressed tool than with a conventional tool when the proper cautions are observed."

The established rule regarding the drafting of specifications and the determination of whether a product offered conforms to those specifications is that such matters are primarily within the jurisdiction of the procuring agency. 50 Comp. Gen. 193, 199 (1970). Where there may be a difference of technical opinion, we will accept the judgment of the procuring agency unless such judgment is shown to be clearly and unmistakably in error. 49 Comp. Gen. 195, 198 (1969). Based on our review of the record, we find that GSA has reasonably supported its use of the UL 45 in connection with the instant procurement. Moreover, we have been informally advised by GSA that in the last two years, five different manufacturers have successfully completed the required tests under Federal specification W-W-650C. Therefore, we cannot hold the specification and tests to be restrictive of competition as contended.

The remaining protest is against the alleged restrictive and improper specifications and qualified products list (QPL) used in connection with solicitation No. FPNTP-B6-61293 which requested bids for various pneumatic tools.

Regarding the specifications, Boston contends that they are improperly drawn and resulted in the Government obtaining unsafe tools. In its report of September 28, 1973, GSA answered each of Boston's

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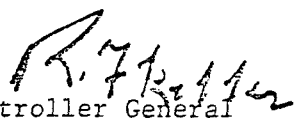
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charges regarding the various sections of the specifications which were challenged. GSA has determined that the deletion of certain features on the tools (i.e., oil reservoir, governor, etc.), still meets the minimum needs of the Government and that such tools are not unsafe. Therefore, our Office will not object to the specification. 49 Comp. Gen. 156, 160 (1969).

Next Boston states that the use of the QPL restricts competition and requests that our Office halt the use of the QPL for pneumatic tools. While it is true that the use of a QPL procedure necessarily restricts competition by its very nature, our Office has held that it is a valid method of procurement when the needs of the procuring agency require it. 36 Comp. Gen. 809, 816 (1957). Based on the record, we feel that such a need has been shown.

In its letters of June 8 and 12, 1973, Boston enclosed copies of letters it had written to the Naval Ships Engineering Center regarding its handling of pneumatic tool procurements. We have received a copy of Navy's reply dated September 11, 1973, which appears to answer its questions and therefore we will not treat the matters raised in those letters in this decision.

Based on the foregoing, the protest is denied.


Deputy Comptroller General
of the United States