

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of IRVIN H. HAHN)
CO., INC.)
) Docket No. MSBCA 1169
Under DGS Request for)
Quotation No. P26868)

January 20, 1984

Bid Samples - General - Bid samples appropriately may be required where necessary to illustrate certain characteristics of an item which cannot be described adequately in a specification.

Bid Samples - Evaluation - The evaluation of bid samples is undertaken to determine responsiveness. When bid samples are required, a solicitation must apprise bidders of the criteria against which the sample will be evaluated. These criteria may be subjective, objective or both.

Bid Samples - Criteria For Evaluation - Manufacturing quality equivalent to an item referenced in the solicitation was deemed to be an adequate criteria for evaluating bid samples.

Bid Samples - Submittal - The submission of a bid sample constitutes a part of the bid. Accordingly, the bid sample must be evaluated to determine whether it complies in all material respects with the evaluation criteria set forth in the solicitation.

APPEARANCE FOR APPELLANT: None
APPEARANCE FOR RESPONDENT: Edward S. Harris
 Assistant Attorney General
 Baltimore, Maryland

OPINION BY CHAIRMAN BAKER

This timely appeal has been taken from a Department of General Services' (DGS) procurement officer's final decision denying Appellant's request for reinstatement of its terminated contract for Maryland State Police tie tacs. The termination action was taken after the DGS procurement officer belatedly determined that Merjo Advertising and Sales Promotion Company (Merjo) had been the low, responsive and responsible bidder under the captioned procurement and, accordingly, that an award to Appellant improperly had been made. The issue before us concerns whether Merjo, the low, responsible bidder under this procurement, also was responsive and, hence, entitled to the award by law. We expressly do not consider whether Appellant may be entitled to cancellation or termination costs, respectively provided for under Md. Ann. Code, Art. 21, §2-201(b) and the termination for convenience clause of the captioned contract.

Findings of Fact

1. On July 20, 1983 DGS issued Request for Quotation (RFQ) No. 26868 for the purchase of approximately 1000 "Coat of Arms" tie tacs and 200 belt buckles to be used by the Maryland State Police.

2. The RFQ purchase description described the tie tacs as follows:

MARYLAND 'COAT-OF-ARMS' TIE TAC's [sic]: Overall Size Face 3/4" x 13/16"; Stamped 14 ga. (.064") Hanco Alley [sic] Metal For Hard Finishing; Buffed & Polished Face; Back To Be Free of Cutter Burrs; Hardsilver Solder To Back (.375") Nickel - Silver Tie Tac W/Spur (B.A. Ballow N-354). . . .

Fastener: Heavy Duty Type With 1-1/2" Chain (Including 2-Jump-Rings) and 7/8" Long Button Hole Bar. . . .

Color Shield Crest: Hard Enamel (Carpenter & Wood) Opaque Gold, Black #26, Ruby #3, and White #28. . . .

Finish: Hot Nickel Electro Plate covered By Gold Electro Plate . . .

Irvin H. Hahn Co., Model #342 or equal

3. With regard to both the tie tacs and the belt buckels, the RFQ further provided that:

"CONDITIONS: Vendor Must Supply With Bid an Equivalent but similar sample Representing Manufacturing quality. Successful Vendor must provide a Preproduction Sample of Actual Item to be Approved by the Purchasing Bureau.

All costs of samples are the responsibility of the Vendor. Quantities are estimated and May exceed Estimated Quantities Depicted Above For A period ending June 30, 1984. . . .

Samples of both items are available at The Purchasing Bureau for review. If, in the case of the tie Tac's [sic] only, it is not possible to come to our offices, a sample will be furnished in return for a request for same accompanied by a check in the amount of \$5.00. This deposit will be returned upon return of sample in original condition.

For Security reasons the Belt Buckels cannot be furnished."
(Underscoring added)

4. Bids were opened on August 18, 1983 and publicly recorded as follows:

	<u>Tie Tacs (1000)</u>	<u>Belt Buckels (200)</u>
Merjo Advertising and Sales Promotions Co. (Merjo)	\$1.80 each	\$6.25 each
Appellant	2.15 each	8.75 each
Bastian Company	3.68 each	4.80 each ¹

5. On September 15, 1983, DGS awarded a contract to Appellant. The low bid submitted by Merjo was determined by a DGS buyer to be non-responsive because the accompanying sample did not demonstrate manufacturing quality equivalent to the Irvin H. Hahn Model #342 tie tac referenced in the RFQ.

6. By letter dated September 16, 1983, Merjo protested the award of a contract for tie tacs to Appellant.

7. Apparently, as a result of Merjo's protest, DGS advised Appellant to stop production of the tie tacs on September 16, 1983. The DGS procurement officer subsequently determined that a statement of objectively measurable criteria relating to the evaluation of the bid samples for manufacturing quality improperly had been omitted from the RFQ. In view of this perceived defect, the DGS procurement officer concluded that the evaluation of the bid samples as performed by his buyer was a nullity and that Merjo could not be disqualified on this basis. Further, because he also believed that the RFQ purchase description was detailed sufficiently to assure, without a bid sample, that Merjo was offering to provide precisely what was desired contractually, the DGS procurement officer determined that an award to Merjo for the tie tacs could be made.

8. By letter dated September 29, 1983, Appellant filed a written protest with the DGS procurement officer alleging that it wrongfully had been ordered to cease work on the tie tacs under DGS Purchase Order No. 26868.

9. By letter dated October 3, 1983, DGS formally cancelled that portion of its contract with Appellant calling for the production and delivery of tie tacs and informed Appellant that it planned to award that item to another bidder.

10. On October 26, 1983, the DGS procurement officer issued a final decision denying Appellant's protest.

11. On November 7, 1983, Appellant filed a timely appeal.

12. Contract award to Merjo for the supply of tie tacs has not been made pending resolution of this appeal.

¹Bastian's bid for the belt buckels was non-responsive

Decision

The RFQ here provided a purchase description of the tie tacs being solicited by DGS. This description contained numerous criteria each representing a production standard which was capable of being determined with certainty. Applicable procurement law, however, recognizes that there may be other characteristics such as feel, texture, workmanship, etc. which adequately cannot be described in a specification " . . . and are properly matters for illustrating by bid sample." D. N. Owens Company, Comp. Gen. Dec. B-190749, 78-1 CPD ¶66 (January 25, 1978) at p. 3. For this reason, presumably, DGS required a bid sample to demonstrate the manufacturing quality which bidders contractually intended to furnish.

Although a DGS buyer originally rejected the low bid submitted by Merjo because its bid sample did not demonstrate a manufacturing quality equivalent to the Irvin H. Hahn Co. Model #342 tie tac referenced in the RFQ, this determination later was reversed by the DGS procurement officer. This action was taken based on the procurement officer's belief that the RFQ improperly failed to establish objectively measurable criteria for evaluation of the bid sample as required by Md. Ann. Code, Art. 21, §3-202 as follows:

(b) Statement required in bid invitation - The invitation for bids shall state whether award will be made on the basis of the lowest bid price or the lowest evaluated bid price, whichever is applicable. If the latter basis is used, the objective measurable criteria to be used shall be set forth in the invitation for bids. (Underscoring added)

As we previously have stated, however, the foregoing requirement pertaining to the evaluation of competitive sealed bids applies to price and the determination of the low bidder. Hanover Uniform Co., Division of Sanford Shirt Co., Inc., MSBCA 1059 (April 13, 1982); Johnson Controls, Inc., MSBCA 1155 (September 21, 1983). Here the evaluation of the bid samples relates to responsiveness and the foregoing statutory provision thus is inapplicable. Compare D. N. Owens Company, supra, at p. 3.

Where bid samples are required by an agency, the stated criteria for evaluation thereof may be objective, subjective or both.² The general requirement for such criteria is that they adequately apprise prospective bidders of the standards against which their bid samples will be evaluated. Airway Industries, Inc. et al., supra, at p. 7.

The issue here, therefore, is whether the RFQ requirement for bidders to submit samples demonstrating a manufacturing quality equivalent to the Irvin H. Hahn Model #342 tie tac sufficiently apprised those bidders as to how their samples would be evaluated? We conclude that it did. Manufacturing

²See Airway Industries, Inc.; United States Luggage Corp., Comp. Gen. Dec. B-190093, 78-2 CPD ¶115 (August 14, 1978) where both objective and subjective tests are set forth. Generally, however, objective characteristics are capable of being determined with certainty and are set forth in the RFQ specifications.

quality, by definition, refers to the general characteristics of an item attributable to the care by which the maker took to fabricate that item. Bidders thus knew that their samples would have to demonstrate the same manufacturing care as was apparent in the Irvin H. Hahn Model #342 tie tac referenced in the RFQ. Although this certainly was a very subjective standard, it is all that relevant procurement law requires. Compare New Britain Hand Tools Division, Litton Industrial Products, Inc., Comp. Gen. Dec. B-192126, 79-1 CPD ¶77 (February 1, 1979).

DGS also cites D. N. Owens Company, supra, for the proposition that a bid sample may be ignored where, as here, the procuring agency determines that the specifications have been stated with sufficient certainty so as to assure that the bidder proposes to provide precisely what has been solicited. The Comptroller General's rationale for the foregoing decision was set forth as follows:

. . . if the advertised specifications, as they should, fully set forth the requirements of the Government, and a bidder without submitting a requested sample with his bid, nevertheless proposes to meet the said specifications and is otherwise entitled to the award, it would usually appear in the interest of the Government to waive as an informality the failure to submit a sample and, by acceptance of the proposal as submitted, to bind such bidder to strict compliance with the specifications. . . . Id. at p. 4.

Here, however, the facts are inapposite to those considered above. Merjo actually submitted a bid sample and, in so doing, demonstrated the manufacturing quality which it intended to provide contractually. This sample constituted a part of Merjo's bid and DGS, by virtue of an award to that firm, would be accepting that sample as the standard for manufacturing quality under the contract. Such an action would be appropriate only where the manufacturing quality of the sample complied with the standard set forth in the RFQ. In other words, the DGS procurement officer properly cannot ignore the Merjo bid sample and must make an affirmative determination as to responsiveness before making an award to that firm.

Although we recognize that a DGS buyer previously has determined that the tie tac sample submitted by Merjo did not demonstrate the standard of manufacturing quality necessary to establish responsiveness, we are uncertain whether the procurement officer has ratified this decision. Accordingly, this appeal is remanded to the DGS procurement officer for further consideration consistent with this opinion. In so doing, we issue several caveats. First, the Merjo bid sample may be evaluated only to ascertain whether it meets the standard of manufacturing quality established in the RFQ. Any characteristic which has a direct correlation to manufacturing quality, however, may be considered in this regard. Airway Industries, Inc., et al., supra. Second, in the event it is determined by the procurement officer that Merjo indeed was non-responsive, care should be taken to identify the characteristics relating to manufacturing quality which render the Merjo bid sample inferior to the Irvin H. Hahn Model #342 tie tac. In this manner, proper review as to the reasonableness of this determination may be made should a subsequent protest be filed.

For the foregoing reasons, the appeal is sustained in part and remanded to the DGS procurement officer for further consideration.

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