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COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

YSA

MAY 21 1965

B-155433

Eugene L. Stewart, Esquire
1001 Connecticut Avenue
Washington, D.C. 20036

Dear Mr. Stewart:

By telefax dated October 28, 1964, and subsequent correspondence, Keoc Industries, Inc., protested against the rejection of its technical proposal submitted in response to invitation for bids No. 208-64 dated May 25, 1964, issued by the United States Marine Corps as the first step of two-step formal advertising for the procurement of 342 air transportable maintenance vans.

Page 7 of the invitation identified the procurement as follows:

"* * * The vans, maintenance, air transportable, with power panels and running gears to be furnished hereunder shall be Type II in accordance with Military Specification MIL-A-81030(WEP) of 21 April 1964, attached hereto as Enclosure (1) which is a part of this Invitation for Bid as modified below. The air conditioners to be furnished for use with the maintenance vans hereunder shall be in accordance with Bureau of Naval Weapons Purchase Description WS-4957 of 14 April 1964, attached hereto as Enclosure (2) which is a part of this Invitation for Bid. Engineering drawings for the Maintenance Vans are also furnished herewith for information. The general configuration, dimensions, tie down points, and location of stress members shall be as shown in these drawings. Where a conflict occurs between the drawings and specification MIL-A-81030(WEP), the specification shall govern.

"Modify Paragraph 3.44.5 of MIL-A-81030(WEP) to provide for the interconnecting of the two (2) air conditioner control cables through a MS-3106 type connector mounted on the surface of the control panel. * * *"

Bidders were advised that technical proposals would be evaluated under the following criteria.

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"1. The bidder's technical understanding of and intent to comply with the provisions of Exhibit 'A'.
[invitation schedule]

"2. The practicability of the bidder's plan of manufacture and purchasing policy.

"3. Suitability of the bidder's quality control system.

"4. Completeness of the proposal.

"5. Soundness of the engineering principles applied.

"6. Ability of the bidder to meet the delivery schedule.

"7. Ability of the proposed unit to give the desired operation and performance.

"8. Ease of manufacture of the proposed unit.

"9. Ease of maintenance of the proposed unit.

"10. Simplicity of design of the proposed unit."

Paragraph 7.1 of purchase description WS-4957 requested bidders to furnish information as follows:

"7.1 Information to Accompany Bid.-Each bidder must furnish with his bid the information specified below. This information will be used in analyzing bids in an endeavor to predetermine compliance with this purchase description and suitability of the equipment for the required service. Compliance with this purchase description in every respect shall be required. Failure to furnish the required information at time specified for opening of bids or failure of the elicited information to conform strictly with specification requirements will require rejection of the bid. The bidder shall submit the following information:

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"a. A schematic layout showing air flow with air temperatures at each point, refrigeration system, control system including sensing points.

"b. Refrigeration load calculations for conditions of 80° F. wet bulb and 110° F. dry bulb temperature.

"c. Name, model number, rating curves and manufacturers' catalog data and cross section drawings were indicated for each of the following:

- "(1) Refrigeration Compressor; make and model number if any.
- "(2) Conditioned Air Blower; make and model number if any.
- "(3) Filters; make and type.
- "(4) Heater Element and Safety Devices; model number and capacity.
- "(5) Temperature and Humidity Sensing Units; make, type and model number.
- "(6) Temperature Control Instruments; make, type and model number.
- "(7) Motors; make type, capacity, characteristics.
- "(8) Contactors; make, type and model number, if any."

Fourteen technical proposals were received on June 23, 1964, and were forwarded on June 26 to the Bureau of Naval Weapons for technical review. The Bureau found that only three firms had submitted acceptable technical proposals; York Astro Division of Wickes Industries, Inc., Harvey W. Hottel, Inc., and the Air-A-Plane Corporation. Since the contemplated procurement involved about \$5 million, the contracting officer determined that acceptable responses from these three firms did not constitute adequate competition. Therefore, it was determined that proposals submitted by the Astro-Science Corporation and Spencer-Safford Loadcraft, Incorporated, could be found to be acceptable with the inclusion

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of a few items of additional information. By August 10, 1964, both of these firms were determined to have submitted acceptable technical proposals.

This protest was the subject of several documented reports from the Marine Corps which were made available to you as Keeco's attorney for review and comment. Also, we have discussed the various aspects of the protest with you and representatives of Keeco on many occasions. It was recognized at all times that since we had neither the technical expertise nor the facilities to reevaluate Keeco's proposal, we had to rely upon the competency of the procurement agency for an evaluation of the technical bases of the protest. We are now in receipt of an additional report from the Marine Corps which, in our opinion, substantially supports the administrative rejection of the Keeco proposal. While reasonable men might honestly differ as to whether a technical proposal is technically responsive to advertised specifications, in situations such as exemplified by this protest, we must resolve any dispute of facts in favor of the determination by the procurement agency which has the primary responsibility to administer the procurement. It is within this framework that our review of this procurement was conducted.

The Marine Corps reports that in response to a telephone call on August 12, 1964, a meeting was arranged with representatives of Keeco, the Director, Procurement Division, and technical and procurement personnel of the Bureau of Naval Weapons and the Marine Corps involved in this procurement. The meeting was held on August 17, 1964, and we are advised that technical personnel of the Government explained to Keeco in detail the almost total lack of documentation in its technical proposal administratively deemed necessary to demonstrate its technical approach to the essential requirements of the purchase description. We understand that the meeting concluded with the understanding that the Marine Corps would request in writing the type of information required of Keeco in order to make possible a determination whether its proposal should be categorized as acceptable or nonacceptable. By letter dated August 21, 1964, Keeco was requested to furnish the necessary additional documentation in support of its understanding and approach to meet the Marine Corps advertised requirements. That letter read in pertinent part:

"In order to complete the evaluation of your technical proposal of 22 June 1964 in response to IEB 208-64, the following information is required:

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"1. A schematic layout of your proposed air conditioner showing air flow with air temperatures at each sensing point, refrigeration system, control system including sensing points.

"2. The information indicated for each of the following air conditioner components:

- "a. Refrigeration Compressor - rating curves, manufacturer's catalog data and cross section drawings.
- "b. Conditioned Air Blower - rating curves, manufacturer's catalog data and cross section drawings.
- "c. Filters - make, model number, type, rating curves, manufacturer's catalog data, and cross section drawings.
- "d. Heater Element and Safety Devices - make, model number, capacity, rating curves, manufacturer's catalog data, and cross section drawings.
- "e. Temperature and Humidity Sensing Units - make, type, model number, rating curves, manufacturer's catalog data, and cross section drawings.
- "f. Temperature Control Instruments - make, type, model number, rating curves, manufacturer's catalog data, and cross section drawings.
- "g. Motors - make, type, characteristics, capacity, model number, rating curves, manufacturer's catalog data, and cross section drawings.
- "h. Contactors - make, type, model number, rating curves, manufacturer's catalog data, and cross section drawings.

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"In accordance with ASPR 2-503.1(c), you are hereby afforded an opportunity to submit the information shown above. This information must be submitted so as to be received in this Office by the close of business on 31 August 1964." (Under-scoring supplied.)

By supplement No. 1, dated August 28, 1964, Keeco provided additional documentation in support of its technical proposal. During the ensuing period up to December 2, 1964, Keeco's proposal as supplemented and those of four other firms were undergoing extensive technical evaluation within the Department of the Navy. It was the considered opinion of the Marine Corps, after making an exhaustive technical evaluation of Keeco's technical proposal, that such proposal was not acceptable. On December 2, 1964, Keeco was advised as follows:

"Rejection was based on your air conditioner proposal which did not comply with the following paragraphs of Purchase Description MB-4957 of 14 April 1964:

"a. Paragraphs 3.5.4, 3.17, 3.13.4.1, 3.13.4.2

"It was therefore felt by the technical advisors that the air conditioner you proposed would deviate from the purchase description and be not acceptable."

It is the position of Keeco that no substantial deficiency exists in its technical proposal which would warrant its rejection by the Marine Corps. In support of this position, considerable information and argument have been furnished to us and in turn transmitted to the Marine Corps for its consideration. The Marine Corps, after fully considering the position as advanced by Keeco and formalized in your letter of December 16, 1964, to us, determined that the equipment offered by Keeco is not adequate to meet the basic needs of the Marine Corps. In this connection, the Marine Corps has reported to us as follows:

"b. Keeco's contention that no substantial deficiency exists in its proposal which would warrant rejection

"There are two major deficiencies in Keeco's proposal that require rejection because they involve substantial deficiencies in design to obtain the required performance of the air conditioner. These deficiencies are: (a) air

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flow and (b) electrical connectors. An engineering analysis of these deficiencies was contained in the memorandum, dated 27 January 1965, from Deputy Chief of Staff (Air) to the Quartermaster General, which has previously been forwarded to your office. The following information is submitted to emphasize the significance and basic importance of these deficiencies:

Nature and function of air conditioning equipment. This air conditioner is a portable, self-contained unit placed on the ground outside the van to be cooled, as indicated in the attached outlined drawing. It supplies cold air by a flexible duct to an opening in the top side wall of the van and warm air is exhausted through two exhaust vents in the lower side wall of the van to which are attached flexible ducts for incoming air to the air conditioner unit. Because of pressure drop inherent in the duct system which includes six short elbows in the return lines, Paragraph 3.5.4. of the Purchase Description required '* * * the evaporator air flow to the space being cooled (emphasis supplied) shall be within the range of 1600 to 1700 cubic feet per minute (cfm) when operating against a static pressure of 0.50 inch of water external in the air conditioner.'

Keco's proposal. The Keco proposal was to use the same air conditioner it currently manufactures to specification MIL-A-52195, modified to 'incorporate the necessary design changes to meet all requirements of Purchase Description WS-4957.'

Keco proposed to make the following 'major design changes':

- (i) Dimension
- (ii) Compressor
- (iii) Removable Skid Assembly
- (iv) Evaporator Fan
- (v) Electrical Heaters
- (vi) Circuit Breakers
- (vii) Phase Sequence Relay
- (viii) Power Cables
- (ix) Control Cables
- (x) Flexible Ducts
- (xi) Power Limitation

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"The very number of these 'major design changes' is indicative of substantial deficiency of the equipment offered. However, the proposal was evaluated on the basis of the design changes proposed.

"A vital design change, from the standpoint of delivering cool air to the space to be cooled, involves the evaporator fan and motor. It was proposed to incorporate fan blades with a greater pitch and a larger horsepower fan motor.

"Supplement No. 1 of Keco's technical proposal showed an air fan and motor producing a total pressure of 4.3 inches water gauge and volume flow of 1650 cubic feet per minute at the tip of the blades. The engineering analysis of this information, contained in the memorandum from the Deputy Chief of Staff (Air), previously referred to, conclusively demonstrates that this total pressure and air flow at the tip of the blades is not sufficient to meet the Purchase Description requirements at the space to be cooled after allowance is made for pressure drop, inherent in the system. After such allowances are made the engineering study concludes that a minimum pressure of 5.33 W.G. at the tip of the blades is necessary to meet the Purchase Description requirement of 1600 to 1700 cfm air flow to the space being cooled. This conclusion is based upon ideal operating conditions with the flexible hose in a straight and taut condition. To insure safety factors for field use, good engineering would establish a 10-20% factor in selecting a fan with a minimum total pressure capability in the range of 6.0 W.G.

"In summary, the original proposal was to supply an air conditioner with admitted design deficiencies to be corrected by 'major design changes'. The Supplement of such proposal furnished redesign information with regard to an evaporator fan and motor that would not produce the air flow required by the Purchase Description at the space to be cooled. This was a fatal deficiency that required rejection of Keco's technical proposal. Clarification or additional information would not have cured the deficiency. Additional major redesign effort by Keco would have been required.

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Electrical connectors. The second major deficiency was in regard to electrical connectors. Paragraph 3.13.4.2 of the Purchase Description required MS-3106-type connector on the evaporator and condenser fan motors. This requirement was satisfactorily met by Keeco's supplementary proposal of 28 August 1964, which proposed the use of MS-3102-type connector on these motors.

"Paragraph 3.13.4.1 of the Purchase Description required an MS-3106-type connector on the compressor motor. Keeco submitted drawings, Corps of Engineers D-8497-60, and Stratoc Division Drawing No. 26664-1, covering the motor compressor assembly, both of which depict electrical terminal studs. These drawings were never supplemented or clarified by Keeco. The use of MS-type connectors would have required redesign of the compressor motor housing and internal wiring configuration of the motor. This is not a simple mechanical arrangement but involved detailed engineering effort. Accordingly, the failure of Keeco to specifically demonstrate how MS-type connectors were to be attached to the compressor motor was a fatal design defect."

Obviously, the Marine Corps does not agree with the position of Keeco that no substantial deficiencies existed in its technical proposal as supplemented. Whether a technical proposal is responsive to the specifications of an invitation is not for our determination. As stated above, our Office has neither an engineering staff nor testing facilities to evaluate the technical aspects of specifications, and in disputes of fact between a technical proposer and the procurement agency concerning such matters, we must accept the administrative evaluation of a proposal. 40 Comp. Gen. 35; id. 40. This is especially true here where the Marine Corps conducted additional technical evaluations for the sole purpose of assuring Keeco that the rejection action was taken in full recognition of all aspects of the specification, the responses thereto made by Keeco, and the arguments advanced by Keeco in support of the acceptability of its proposal. Since we are faced here with conflicting engineering analyses and approaches to satisfy the Marine Corps needs, we will not substitute our judgment for that of the Marine Corps.

Whether the rejection of Keeco's technical proposal as supplemented was otherwise proper is a matter governed by paragraphs 2-503.1(c) and (d) of the Armed Services Procurement Regulation (ASPR), which provide

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as follows with respect to the evaluation and rejection of technical proposals under the two-step formal advertising procedure:

"(c) Technical evaluation of the proposals shall be based upon the criteria contained in the request for technical proposals and such evaluation shall not include consideration of capacity or credit as defined in 1-705.4. Upon completion of the technical evaluation, each proposal shall be categorized as acceptable or unacceptable. Proposals shall not be categorized as unacceptable when a reasonable effort on the part of the Government to obtain clarification or additional information could bring the proposals to an acceptable status and thus increase competition. The contracting officer shall arrange for any necessary discussions with sources submitting technical proposals. When, after discussion, clarification, and submission of necessary documentation for incorporation in the proposal, technical proposals are determined to be acceptable, they shall be so categorized. If, however, it is determined at any time that a technical proposal is not reasonably susceptible to being made acceptable, it should be classified as unacceptable and further discussion of it is unnecessary.

"(d) Upon final determination that a technical proposal is unacceptable, the contracting officer shall promptly notify the source submitting the proposal of that fact. The notice shall state that revision of his proposal will not be considered, and shall indicate, in general terms, the basis for the determination for example, that rejection was based on failure to furnish sufficient information or on an unacceptable engineering approach." (Underlining supplied.)

Reverting back to the Marine Corps letter of August 21, it would seem that the technical information requested of Keeco was extensive and had reference to eight apparent deficiencies in Keeco's proposal. The Marine Corps reports that at that point in time such deficiencies would have normally provided the basis for a determination that Keeco's proposal was so deficient as to be termed "unacceptable." The Marine Corps further advised that the facts of record do not warrant the assumption that this was a borderline proposal requiring only "a reasonable effort on the part of the Government to obtain clarification." The

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meaning of the term "clarification" as used in this context has reference to an existing acceptable proposal that is uncertain or unclear requiring only further explanation to make it clear.

We feel that the notice of rejection dated December 2 advised Keco in general terms the basis for the determination, i.e., failure to meet the specific requirements of WS-4957. This reasonably met the requirements of the regulation which provides also that a proposal determined at any time as not reasonably susceptible to being made acceptable, should be classified as unacceptable without further discussion. It thus appears, that as of August 12, 1964, the Keco proposal properly could have been rejected as unacceptable without further discussion, but that, in an effort to assure maximum competition, the Marine Corps gratuitously provided Keco with a second opportunity to make its proposal acceptable. In this posture of the matter, we must agree with the Marine Corps that every effort was expended to make Keco's proposal acceptable but without result. In this connection the Marine Corps has stated that the determination of "unacceptability" and the handling of this procurement has been the subject of continuous review at high levels in the Marine Corps, the Bureau of the Navy Department, the Navy General Counsel, Chief of Naval Material, Assistant Secretary of the Navy for Installations and Logistics, and the Assistant Secretary of Defense for Installations and Logistics, and that such determination of "unacceptability" has been reviewed and concurred in by highest Navy authority.

In view of the foregoing, and since we find no basis under section II, part 5, ASFR, to question the rejection of Keco's technical proposal, the protest is denied.

Very truly yours,

Joseph Campbell

Comptroller General
of the United States

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